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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 189.

WILLIAM MILNE, EXECUTOR OF WILLIAM M. WILSON, DECEASED, PLAINTIFF IN ERROR,

vs.

ANN MARIA DEEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 23, 1883.

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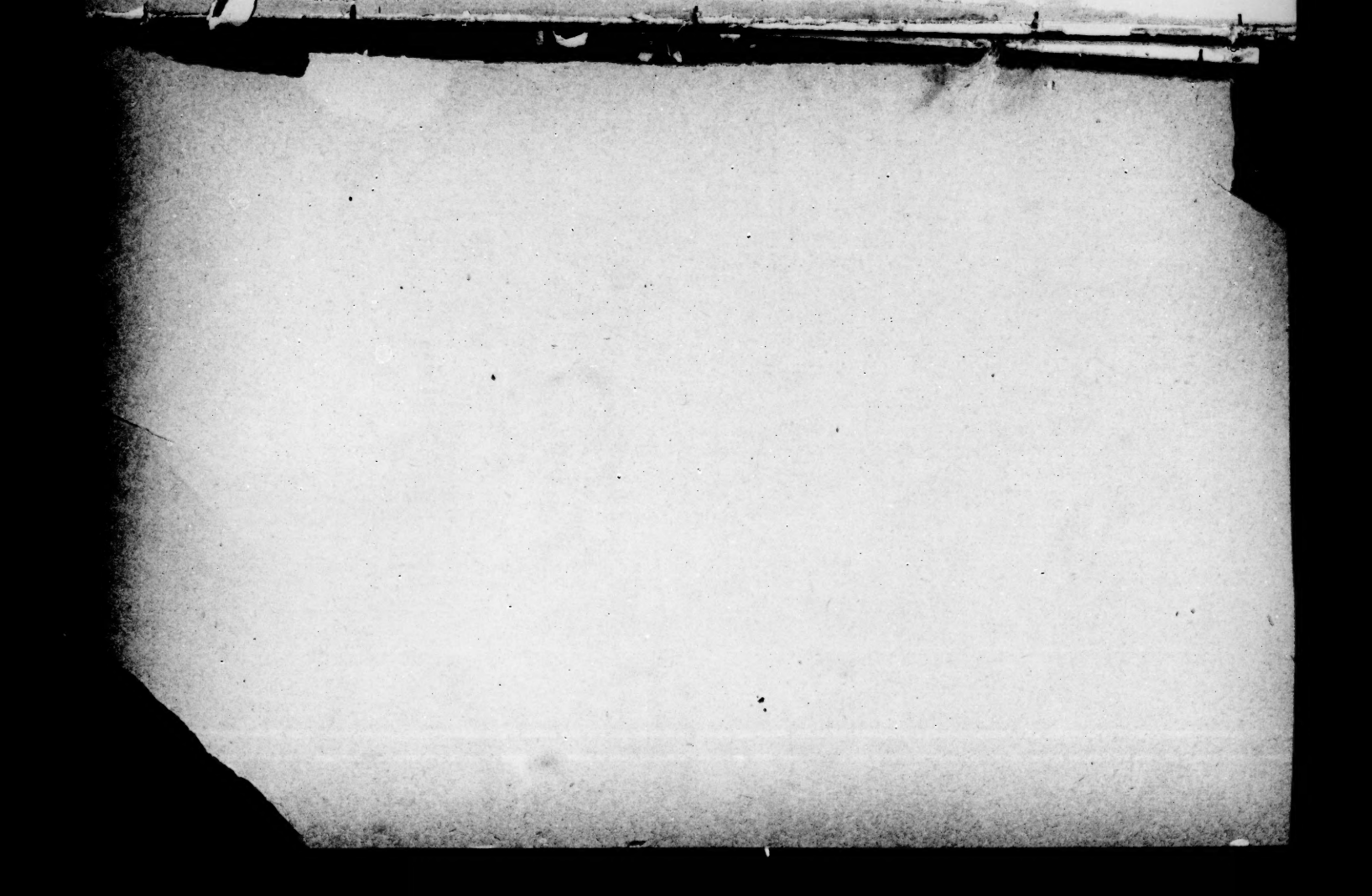

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1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you between Ann Maria Deen, plaintiff, and William M. Wilson, defendant, a manifest error hath happened, to the great damage of the said William M. Wilson, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the fourth Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 1st day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed Sept. 28th, A. D. 1883.

N. SHIPMAN, *Judge.*

2 [Endorsed:] U. S. Supreme Court. William M. Wilson, plaintiff in error, *vs.* Ann Maria Deen, defendant in error. Writ of error. John Chetwood, att'y — pl't'ff in error, 145 Broadway, N. Y. city. U. S. circuit court. Filed Oct. 1, 1883. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to one hundred and forty-nine, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William M. Wilson, plaintiff in error, against Ann Maria

Deen, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 22d day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

3 U. S. Circuit Court, S. D. of New York.

ANN MARIA DEEN *vs.* WILLIAM M. WILSON.

To the clerk of the U. S. circuit court S. D. of N. Y.:

Please issue the summons in the above-entitled action.

Yours, &c,

JAS. K. HILL,
WING & SHOUDY,
Pl'ff's Att'ys, 37 & 39 Wall St., N. Y. City.

Dated Feb. 23rd, 1881.

(Endorsed:) Deen *v.* Wilson. *Præcipe.* U. S. circuit court. Filed Feb. 23, 1881. Joseph M. Deuel, clerk.

4 United States Circuit Court for the Southern District of New York.

ANA MARIA DEEN, Plaintiff,
against
WILLIAM M. WILSON, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 23d day of February, in the year one thousand eight hundred and eighty-one.

[L. S.] JOSEPH M. DEUEL, *Clerk.*

JAS. K. HILL,
WING & SHOUDY,
Plaintiff's Attorneys.

Office and post office address, 37 & 39 Wall street, N. Y. city, New York.

5 [Endorsed:] United States circuit court, southern district of New York. Ann Maria Deen *vs.* William M. Wilson. Copy.

Summons. Jas. K. Hill, Wing & Shoudy, plaintiff's attorneys, 37 & 39 Wall St., N. Y. city. U. S. circuit court. Filed Feb. 25, 1881. Joseph M. Deuel, clerk.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I hereby certify that on the 25th day of February, 1881, at the city of New York, I personally served the within summons on the within-named defendant, William M. Wilson, by showing the same and delivering to and leaving with him a true copy thereof, and at the same time and place I delivered to said defendant a copy of the complaint in this action.

(S'g'd) LOUIS F. PAYN.
U. S. Marshal.

6 *Complaint.*

Circuit Court of the United States for the Southern District of New York.

ANN MARIA DEEN, Plaintiff,
against
WILLIAM M. WILSON, Defendant.

The plaintiff above named, by Jas. K. Hill, Wing and Shoudy, her attorneys, complains and avers—

First. That during all the times hereinafter mentioned the plaintiff, Ann Maria Deen, was and still is a citizen of the State of New Jersey, and that during the same times the defendant, William M. Wilson, was and still is a citizen of the State of New York, in the southern district thereof, within the second circuit of this court.

Second. That on the 29th day of October, 1873, the plaintiff and one Mary C. C. Perry duly executed under their hands and
7 seals in duplicate a lease, partly written and partly printed, a copy of which is hereunto annexed, marked "Schedule A."

Third. That at the same time, and as a part of the same transaction, the defendant duly executed under his hand and seal a guarantee, a copy of which is hereunto annexed, marked "Schedule B," and thereupon the said lease and guarantee were duly delivered to the plaintiff.

Fourth. That thereupon the said Mary C. C. Perry entered into the possession of the premises mentioned in said lease, and paid to the plaintiff the sum of four hundred and fifty dollars as and for the first month's rent under said lease.

Fifth. That neither the said Mary C. C. Perry nor the defendant have ever paid any further or other rent reserved by said lease.

8 Sixth. That the premises mentioned in said lease consisted of a very valuable dwelling-house, with the furniture therein, and were leased to the said Perry to be occupied by her as a dwelling-house, and for no other purpose.

That at some time in or after the month of December, 1873, the said Mary C. C. Perry ceased to occupy the said house as a dwelling-

house and abandoned the same, leaving the said house and furniture in an unprotected condition and liable to suffer great damage by reason of said abandonment.

That in consequence of such abandonment the said house and furniture were greatly damaged, and afterwards, and on or about the first day of December, 1874, the plaintiff, for the purpose of preserving the premises, protecting the property, and preventing further injury thereto by reason of such abandonment, and of diminishing as far as possible the loss sustained by her by reason of the failure of said Perry to continue to occupy the said premises
9 as a dwelling-house and abandoning the same, after notice to said Perry, proceeded to let the said premises on account of the said Perry for the sum of three hundred dollars per month for the remainder of the term mentioned in said lease, that being the highest rent that could be obtained therefor.

Seventh. That there is due and unpaid under said lease for the rent therein reserved up to December 1st, 1874, the sum of five thousand four hundred dollars, besides the interest which accrued on each month's rent of four hundred and fifty dollars from the time it became due under said lease according to the terms thereof, and for rent after December 1st, 1874, to the end of the term of said lease, after crediting the defendant with the amount collected from the occupant of the said house from that date, a balance of three thousand one hundred and fifty dollars for rent after December 1st, 1874.

That no part of the said sums of five thousand four hun-
10 dred dollars or three thousand one hundred and fifty dollars, amounting in the aggregate to eight thousand five hundred and fifty dollars, has been paid.

Wherefore plaintiff demands judgment against said defendant for said sum of eight thousand five hundred and fifty dollars, with interest thereon from average monthly date of payment, besides the costs and disbursements of this action.

(S'g'd) JAS. K. HILL,
WING & SHOUDY,
Plaintiff's Attorneys, Numbers 37
and 39 *Wall St., New York City.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Ann Maria Dean being duly sworn, says that she is the plaintiff named in the foregoing complaint; that she has read the said complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein
11 stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

(S'g'd) A. M. DEAN.

Subscribed and sworn to before me this 19th day of February, 1881.

ALEX. CAMERON,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

12 SCHEDULE "A."

This indenture, made the 29th day of October, one thousand eight hundred and seventy-three, between Ann Maria Dean, of the city of New York, party of the first part, and Mary C. C. Perry of the same place, party of the second part, witnesseth that the said party of the first part hath letten, and by these presents doth grant, demise, and *to* farm-let, unto the said party of the second part the house known as number four East Thirtieth street, in the city of New York, with the furniture therein, a schedule of which is to be made in duplicate, upon the party of the second part taking possession of the premises, and to be annexed to this lease, to be used as a dwelling-house and for no other purpose whatever, with the appurtenances, for the term of two years and ten months from the first day of November, one thousand eight hundred and seventy-three, at the rent or sum of four hundred and fifty dollars per month, payable on the first day of each month in advance. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall
13 be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom. And the said party of the second part hereby covenants to pay to the said party of the first part the said rent as herein specified, and also to pay the regular annual rent or charge which is or may be assessed or imposed according to law upon the said premises for the Croton water on or before the first day of August in each year during the term, and if not so paid the same shall be added to the month's rent then due. And the said party of the second part further covenants that she will not assign this lease, nor let or underlet the whole or any part of said premises, nor make any alteration therein without the written consent of the said party of the first part, under the penalty of forfeiture and damages, and that she will not occupy or use the said premises nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise without the like consent under the like penalty. And the said party of the second part further covenant- that she will permit the said party of the first part, or her agent, to show the premises to persons wishing to live or purchase, and on and after the first day of February next preceding the expiration of the term will permit the usual notice of "To let" or "For sale" to be placed upon the walls or doors of said premises and remain thereon without hindrance or molestation.

And it is further agreed between the parties to these presents that in case the building or buildings erected on the premises hereby leased shall be partially damaged by fire the same shall be repaired as speedily as possible at the expense of the said party of the first part; that in case the damage shall be so extensive as to render the building untenantable, the rent shall cease until such time as the building shall be put in complete repair; but in case of the total destruction of the premises, by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thence-

forth this lease shall cease and come to an end: Provided, however, That such damage or destruction be not caused by the carelessness, negligence, or improper conduct of the party of the second part, her agents or servants.

14 And at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised and the said furniture in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And it is further understood and agreed that the party of the second part shall make all repairs that may become necessary during the continuance of the term hereby demised, and leave the furnace and range in good repair and condition.

And the said party of the first part doth covenant that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of—

(S'g'd) ANN MARIA DEEN. [SEAL.]
(S'g'd) MARY C. C. PERRY. [SEAL.]

15 [Endorsed:] Ann Maria Deen to Mary C. C. Perry. Lease. C. W., fire clause, &c. Dated October, 1873.

SCHEDULE "B."

In consideration of the letting of the premises within mentioned to the within-named Mary C. C. Perry, and the sum of one dollar to me paid by the said party of the first part, I, William M. Wilson, do hereby covenant and agree, to and with the party of the first part above named and her legal representatives, that if default shall at any time be made by the said Mary C. C. Perry in the payment of the rent and performance of the covenants contained in the within lease on her part to be paid and performed that I will well and truly pay the said rent, or any arrears thereof, that may remain due unto the said party of the first part, and also all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said party of the first part.

Witness my hand and seal this 29th day of October, in the year one thousand eight hundred and seventy-three.

Witness— W. M. WILSON. [SEAL.]

16 (Endorsed:) U. S. circuit court, S. D. of N. Y. Ann Maria Deen ag'st William M. Wilson. Complaint. Jas. K. Hill, Wing & Shoudy, attorneys for plaintiff, 37 & 39 Wall St., New York city. U. S. circuit court. Filed Feb. 23, 1881. Joseph M. Deuel, clerk.

Circuit Court of the United States for the Southern District of New York.

ANN MARIA DEEN, Pl'ff, *ag'st* WILLIAM M. WILSON, Defe't.

The defendant, answering plaintiff's complaint, says that he admits the residence of plaintiff and of himself and their citizenship, as stated in the complaint. Defendant, further answering, says that the alleged lease and guaranty set forth in the complaint, and copies of which are thereto annexed, were never executed and were never delivered; that in the latter part of October, 1873, Mary C. C. Perry went to the premises in the complaint described, which were offered to let furnished; that said Mary C. C. Perry examined the premises and found a considerable part of the furniture
18 missing; that said Mary C. C. Perry told plaintiff that she wanted to hire a furnished house, to be used by her as a first-class boarding house, from the following first day of November; that plaintiff was also told that said Mary C. C. Perry had no furniture to supply any deficiencies, with a few expressed exceptions, and had no money with which to buy such furniture. Plaintiff then represented that the missing furniture was out to be cleaned and repaired, and would all be put back before the first day of November, and described the furniture to be such as was fit and proper and complete for the purposes of said Mary C. C. Perry.

Upon condition that such furniture should be put in, and in entire reliance upon the said representations & promises of plaintiff, said Mary C. C. Perry agreed to take the house with such
19 furniture in, at a rent of four hundred and *and* fifty dollars per month for a term of two years and ten months from November 1st, 1873; and defendant, upon the same conditions and in reliance upon the same representations and promises which were made to him as well as to said Mary C. C. Perry, agreed, if the said Mary C. C. Perry took the house with such furniture in for such term, that he would become surety for the rent under said proposed guaranty.

The plaintiff had prepared in advance the papers set forth in the complaint, but the same were incomplete, and she promised to complete the same by adding thereto a schedule of the furniture which she agreed and promised to put into the house, and which said schedule was to be signed by the said Mary C. C. Perry and herself, and thereupon said proposed lease was to be delivered & become operative, & said guaranty was to be delivered & become opera-
20 tive. Upon this promise and agreement plaintiff induced defendant and said Mary C. C. Perry to sign the proposed lease and guaranty, but such papers were not to take effect or become operative until such furniture was put into the house, and a schedule of said furniture complete was annexed to said paper and signed by said Mary C. C. Perry and said plaintiff. Plaintiff never did put such furniture into said house, and never intended so to do, and a schedule of said furniture complete was never annexed to said paper or signed.

Plaintiff wilfully & falsely made the aforesaid and other like representations and promises, with no intention to fulfill the same, and with knowledge of their falsity, for the express purpose of
21 deceiving the said Mary C. C. Perry & this defendant, and to fraudulently obtain from them their signature to such papers, and also to obtain from them the sum of four hundred and fifty dollars in advance of one month's rent of said premises, which sum of money the defendant, relying upon and deceived by such representations and promises, and at the request of said Mary C. C. Perry, who equally relied upon and was deceived by such promises and representations, paid to plaintiff.

That said Mary C. C. Perry repeatedly went to said house from the time of signing said paper up to the 7th day of November then next; that the furniture never was put into said house according to the agreement, promise, and representation of plaintiff, and said schedule never was prepared or signed, and said proposed guaranty — proposed lease never was actually delivered, although said Mary
22 C. C. Perry constantly made demand on plaintiff that it should be done, and constantly declared to plaintiff that she could not and would not take possession of said house until said furniture was placed therein complete, and until said schedule thereof was signed, and said proposed lease and proposed guaranty delivered in conformity with the agreements, promises, and representations under which they had been signed in anticipation of such delivery; that said Mary C. C. Perry, after such unsuccessful demands, abandoned, of necessity, all further attempts to obtain said house furnished, or the delivery of said lease.

2d. And for a further separate and distinct defense this defendant, answering, says that in the month of December, 1873, this plaintiff brought an action in the marine court of the city of New
23 York against this defendant for the rent of said premises in the complaint described for the said month of December, 1873, being for the same cause of action as that set forth in the complaint therein; and this defendant recovered judgment against this plaintiff, duly given upon the merits thereof in said action, and for fifty-five dollars and ninety-one cents, the costs of said action.

The defendant denies each and every allegation of plaintiff's complaint not hereinbefore admitted, and prays that the same be dismissed with costs.

JOHN CHETWOOD,
Att'y [for] Def't, 74 B'way, N. Y.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William M. Wilson, being duly sworn, says that he is the defendant in this action; that the foregoing answer is true of his own knowledge except as to the matters therein stated to be alleged on information & belief, & as to those matters he believes them to be true.

W. M. WILSON.

Sworn to before me this April 11th, 1881.

ADAM GOS,
Notary Public, N. Y.

24 (Endorsed:) U. S. circuit court, south. dist. N. Y. Ann Maria Deen ag'st William M. Wilson. Answer. John Chetwood, att'y for def't, 74 Broadway, N. Y. Service admitted April 12, 1881. U. S. circuit court. Filed Apr. 12, 1881. Joseph M. Deuel, clerk.

25 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Wednesday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Nathaniel Shipman, judge.

ANN MARIA DEEN *vs.* WILLIAM M. WILSON.

This case being still on trial the jurors sworn in it are called and severally answer to their names.

The court denies the motion heretofore made herein to direct the jury to find a verdict for the defendant, and Mr. Fullerton excepts to the ruling of the court in so doing.

Mr. Smith moves that the court direct the jury to find a verdict for the plaintiff for the sum of $12,026.89.

The jury say that by direction of the court they find a verdict for the plaintiff for the sum of twelve thousand and twenty-six
26 dollars and eighty-nine cents, and so say they all.

Prior to the rendering and recording of the verdict Mr. Fullerton requests to go to the jury on certain questions of fact, which he states. The court refuses said request and Mr. Fullerton excepts to the ruling of the court in so doing.

Also, prior to the rendering and recording of the verdict, Mr. Fullerton excepts to the ruling of the court in directing the jury to find a verdict for the plaintiff for the sum of $12,026.89.

On motion of Mr. Fullerton, ordered that the defendant have a stay of entry of judgment on said verdict for forty-five days within which to prepare and serve a bill of exceptions herein.

A copy from minutes.

[Seal U. S. Circuit Court, S. D. of N. Y.]

(S'g'd) TIMOTHY GRIFFITH, *Clerk.*

(Endorsed:) C. C. of the U. S., S. D. of N. Y.. Deen *vs.* Wilson Certified transcript from minutes.

27 *Judgment.*

United States Circuit Court, Southern District of New York.

ANN MARIA DEEN *vs.* WILLIAM M. WILSON.

This cause having been tried at a stated term of this court held in

the United States court and post-office building, in the city of New York, before the Hon. Nathaniel Shipman and a jury, on the 10th, 11th, 14th, 15th, and 16th days of May, 1883, and the jury having rendered a verdict for the plaintiff, by direction of the court, for the sum of twelve thousand and twenty-six dollars and eighty-nine cents ($12,026.89), and plaintiff's costs having been taxed by the clerk of this court at the sum of ninety-five & $\frac{59}{100}$ dollars:

Now, on motion of Jas. K. Hill, Wing & Shoudy, plaintiff's attorneys—

It is ordered, adjudged, and decreed, That Ann Maria
28 Deen, the plaintiff, do recover of the defendant, William M. Wilson, the sum of twelve thousand and twenty-six dollars and eighty-nine cents ($12,026.89), the amount of the verdict, with interest thereon from May 16, 1883, the day of the rendition of the same, amounting to the sum of two hundred and sixty-four $\frac{59}{100}$ dollars, together with the sum of ninety-five & $\frac{59}{100}$ dollars costs, as taxed by the clerk of this court, amounting in the aggregate to the sum of twelve thousand three hundred & eighty-seven & $\frac{07}{100}$ dollars, and that she have execution therefor.

Judgment signed this 28th day of Sept., 1883.

JOHN A. SHIELDS,
Deputy Clk.

29 [Endorsed:] U. S. circuit court, S. D. of N. Y. Ann Maria Deen *vs.* William M. Wilson. Copy judgment. Record. Jas. K. Hill, Wing & Shoudy, attorneys for pl'ff, 45–49 William St., New York city. U. S. circuit court. Filed Sep. 28, 1883. Timothy Griffith, clerk.

30 U. S. Circuit Court, Southern District of New York.

ANN MARIA DEEN, Pl'ff, *against* WILLIAM M. WILSON, Def't.

The issue joined in this action came on to be tried by a jury before the Hon. N. Shipman at a circuit court held at the city of New York, in and for the southern district of New York, on the 11th day of May, 1883, and such trial was had on said 11th and on the 14th, 15th, and 16th days of May, 1883.

Upon the trial of the said action counsel for plaintiff, to maintain and prove the issue on his part, proved the service upon Mrs. Mary C. C. Perry, personally, on March 27, 1874, of a copy of the
31 paper (marked Plaintiff's Exhibit A) which was signed by plaintiff.

Plaintiff also proved the execution by plaintiff and Mary C. Perry of the following lease:

32 *Lease No.* 2.

This indenture, made the 29th day of October, one thousand eight hundred and seventy-three, between Ann Maria Deen, of the city of New York, party of the first part, and Mary C. C. Perry, of the same place, party of the second part, witnesseth:

That the said party of the first part hath letten, and by these pres-

ents doth grant, demise, and *to* farm-let, unto the said party of the second part the house known as number four East Thirtieth street, in the city of New York, with the furniture therein, a schedule of which is to be made in duplicate upon the party of the second part taking possession of the premises, and to be annexed to this lease, to be used for a dwelling-house, and for no other purpose whatever, with the appurtenances, for the term of two years and ten months from the first day of November, one thousand eight hundred and seventy-three, at the rent or sum of four hundred and fifty dollars per month, payable on the first day of each month, in advance.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and the same to have again, repossess, and enjoy. And the said party of the second part hereby covenants to pay to the said party of the first part the said rent as herein specified, and also to pay the regular annual rent or charge which is or may be assessed or imposed according to law upon the said premises for the Croton water on or before the first day of August in each year during the term, and if not so paid the same shall be added to the month's rent then due. And the said party of the second part further covenants that she will not assign this lease, nor let or underlet the whole or any part of the said premises, nor make any alterations therein without the written consent of the said party of the first part, under the penalty of forfeiture and damages, and that she will not occupy or use the said premises nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise without the like consent under the like penalty; and the said party of the second part further covenants that she will permit the said party of the first part, or her agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term will permit the usual notices "To let" or "For sale" to be placed upon the walls or doors of said premises, and remain thereon, without hindrance or molestation.

33

And it is further agreed between the parties to these presents that in case the building or buildings erected on the premises hereby leased shall be partially damaged by fire the same shall be repaired as speedily as possible at the expense of the said party of the first part; that in case the damages shall be so extensive as to render the building untenantable the rent shall cease until such time as the building shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end: Provided, however, That such damage and destruction be not caused by the carelessness, negligence, or improper conduct of the party of the second part, her agents or servants.

34

And that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised and the said furniture in as good state and condi-

tion as reasonable use and wear thereof will permit, damages by the elements excepted.

And it is further understood & agreed that the party of the second part shall make all repairs that may become necessary during the continuance of the term hereby demised, & leave the furnace & range in good repair & condition.

And the said party of the first part doth covenant that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives.

In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

ANN MARIA DEAN. [L. S.]
MARY C. C. PERRY. [L. S.]

Sealed and delivered in the presence of—

——— ———.

35 The plaintiff further proved the due execution by the defendant of the following agreement, which was attached to said lease and which was delivered to plaintiff by defendant:

In consideration of the letting of the premises within mentioned to the within-named Mary C. C. Perry, and the sum of one dollar to me paid by the said party of the first part, I, William M. Wilson, do hereby covenant and agree to and with the party of the first part above named and her legal representatives that if default shall at any time be made by the said Mary C. C. Perry in the payment of the rent and the performance of the covenants contained in the written lease on her part to be paid and performed that I will well and truly pay the said rent, or any arrears thereof, that may remain due unto the said party of the first part, and also all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said party of the first part.

Witness my hand and seal this 29th day of October in the year one thousand eight hundred and seventy-three.

W. M. WILSON, [L. S.]

Witness:

——— ———.

Said lease and agreement were offered in evidence by the plaintiff, and were received. Plaintiff proved that she received, at the time of the execution of the lease, from Mr. Wilson a check for one month's rent, $450, and that she did not receive any further sum from him.

Plaintiff's counsel then asked plaintiff—

Q. After the first of November did you receive any information from any source—if so, from what source—as to the manner in which this house was being occupied?
36

A. Yes, I did.

Q. From whom did you receive such information?

A. I received it from several persons; from a policeman and from young Dr. Sayre, the son of old Dr. Sayre.

Q. Did you in consequence of this information, which you received from various sources, and under the advice of your counsel, sign that paper which is marked "Exh. A, for identification," and dated March 27th, 1874, and cause it to be served?

A. Yes.

Q. Did you afterwards in pursuance of this notice take possession of the premises?

A. Yes.

Q. Whom did you find in occupation of the premises?

Defendant's counsel objected to the question. The court
37 overruled the objection, to which ruling the defendant then and there duly excepted.

A. I found a man there who was with Mrs. Perry when she took possession of the house; his name was John Burns.

Q. When did you first see this man?

A. I first saw him with Mrs. Perry and Mr. Wilson; they brought him to the house the day the lease was signed.

Q. Was he employed by you in any way?

A. No, sir: I never say the man before and did not know anything about him; he came with them and with their things and assisted in bringing them in.

Q. When was it that you took possession in the manner that you have stated, in pursuance of this notice?

A. I think it was the 29th day of April, 1874.

Q. Did you thereafter make any effort to let the premises for account of Mrs. Perry?

38 A. Yes, sir; I made every effort I possibly could by advertising; I put it in the hands of agents also, and put a bill on the house and tried to rent it myself.

Q. Did you succeed in renting it?

A. Yes, sir; I rented it, I think, on the first day of December, 1874, to Mr. Sherman; the lease was in writing.

Q. Is that the paper by which you let it?

A. Yes, sir; that is the paper.

Paper offered in evidence, admitted, and marked Pl'ff's Exhibit No. 3, and is as follows:

39 *Lease. C. W., Fire Clause, &c.*

This indenture, made the 27th day of November, one thousand eight hundred and seventy-four, between Ann Maria Deen, wife of John L. Dean, of New Providence, Union county, in the State of New Jersey, party of the first part, and David H. Sherman, of the city, county, and State of New York, party of the second part, witnesseth:

That the said party of the first part hath letten, and by these presents doth grant, demise, and *to* farm-let, unto the said party of the

second part the premises known as No. 4 East 30th street, in the city of New York, to be used and occupied only as a private dwelling, together with two mantel mirrors and one pier glass, with cornice, on parlor floor and and one pier glass, with cornice, on second floor, and also all the gas fixtures in and upon said premises, with the appurtenances, for the term of two years and five months from the first day of December, one thousand eight hundred and seventy-four, at the yearly rent or sum of thirty-six hundred dollars, to be paid in equal half-yearly payments in advance.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom; and the said party of the second part hereby covenants to pay to the said party of the first part the said yearly rent as herein specified, and also to pay the regular annual rent or charge which is or may be assessed or imposed according to law upon the said premises for the Croton water on or before the first day of August in each year during the term, and if not so paid the same shall be added to the rent then due; and the said party of the second part further covenants that he will not assign this lease, nor let or underlet the whole or any part of the said premises, nor make any alteration therein, without the written consent of the said party of the first part, under the penalty of forfeiture and damages, and that he will not occupy or use the said premises, nor permit the same to be occupied or used, for any business deemed extra hazardous on account of fire or otherwise without the like consent, under the like penalty; and the said party of the second part further covenants that he will permit the said party of the first part, or her agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term will permit the usual notice of "To let" or "For sale" to be placed upon the walls or doors of said premises and remain thereon without hindrance or molestation.

And it is further agreed between the parties to these presents that in case the building or buildings erected on the premises hereby leased shall be partially damaged by fire the same shall be repaired as speedily as possible at the expense of the said party of the first part; that in case the damage shall be so extensive as to render the building untenantable the rent shall cease until such time as the building shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end: Provided, however, That such damage or destruction be not caused by the carelessness, negligence, or improper conduct of the party of the second part, his agents or servants.

And the party of the second part hereby further agrees to make all repairs in and about the said demised premises that may be necessary to keep and maintain the same in good, tenantable condition.

41 And that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised, and also the said mirrors, pier glasses, cornices, and gas fixtures, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And the said party of the first part doth covenant that the said party of the second part, on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

ANN MARIA DEEN. [SEAL.]
DAVID H. SHERMAN. [SEAL.]

Sealed and delivered in the presence of—
GEO. CONOVER.

42 [Endorsed:] Ann Maria Deen to David H. Sherman. Lease. C. W., fire clause, &c. Dated Nov. 27th, 1874.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 10th day of May, 1883, before me personally came George Conover, subscribing witness to the within lease, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of Brooklyn, New York; that he was acquainted with Ann Maria Deen & David H. Sherman, and knew them to be the persons described in and who executed the said conveyance, and that he saw them executed & deliver the same, and that they acknowledged to him, the said George Conover, that they executed and delivered the same, and that he, said George Conover, thereupon subscribed his name as a witness thereto.

SIMEON FORD,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

43 Q. Were the terms of this lease the best terms you could obtain for the letting of the premises after you took possession?

A. Yes, sir; it was the very best offer I had. I collected the rent which was reserved in this lease and credited Mr. Wilson with it. The lease is dated November 27, 1874, from Mrs. Deen to David H. Sherman of the premises in question, and is substantially the same as the other lease, being for an annual rent of $3,600, payable half-yearly in advance.

Q. Did you find anybody in occupation of the premises except this man, John Burns, of whom you speak?

Ans. No, sir.

The plaintiff's counsel asked the following question:

Q. Were there any indications of the house having been occupied by——

The defendant's counsel here interrupted and objected.

44 The counsel for the plaintiff stated that he propoposed to show the existence of certain facts rendering it necessary to take possession.

The counsel for the defendant conceded that the plaintiff did have a right to take possession.

The court held that the plaintiff had the right to offer evidence in pursuance of its theory, but said too much particularity should not be gone into upon this point.

Q. Previous to letting the premises to Mrs. Perry, had you been in occupation of them?

A. Yes, sir; I had been in occupation from the first day of May, 1873, up to the time I rented them to Mrs. Perry and she took possession. I left the premises the first day of November, 1873.

45 Q. Whom did you leave in possession then?

A. Mrs. Perry.

Q. Was she there personally?

A. Yes; she had this man John Burns there, and he was the only one I found there when I took possession in April, 1874. When I took possession I noticed that the carpets and the marble mantel, mirror, and frame and all those surroundings were very much damaged by fire. It looked to me as though they had a great deal of fire there, and the chairs all about were in a very bad condition. The second story front room was also in very bad condition. I remember those two rooms very well. I also had new blankets and comforters, and they were very much damaged and looked as though they had been treated very badly and were very much out of order.

Q. Can you state the day you took possession?

Ans. April 29th, 1874.

46 Q. Did you receive any notice from Mrs. Perry or from Mr. Wilson in answer to your notice of March 27, 1874?

A. No, sir.

On cross-examination by defendant's counsel the witness testified as follows:

The lease was at defendant's house when I signed it. Mrs. Perry put her signature to the lease at the same time. Mr. Wilson also signed it at the same time and place. I signed it first, Mrs. Perry next, and then Mr. Wilson. It was handed me after it was signed, I think. I am quite sure I did not pick it up, as they took one of the leases and I took the other. I think it was Mr. Wilson that handed me the lease; am not positive. It was either Mr. Wilson who handed it to me or Mrs. Perry; am not sure which, but I am positive it was handed me by one or the other.

47 Q. Was the house at the time this paper was signed in a condition to be taken possession of by Mrs. Perry, so that she could enjoy all that she was entitled to?

A. It was in the same condition in which she hired it.

Q. Was there nothing to be done to the house in order that she might enjoy it?

A. Nothing that I agreed to do. She took it as it was.

Q. Nothing to be done on your part?

A. No, sir.

Q. Nothing whatever.

Ans. Nothing.

Q. Was there nothing to be done to enable this lady to enjoy the property for which she was to pay rent?

A. I promised to put in seven blankets and seven quilts in the agreement with Mrs. Perry.

Q. Was that all you agreed to do?

A. I promised to put in a set of plain white China dishes.

Q. Have you now mentioned all you were to do?

A. I promised also to put in a few kitchen utensils—a
48 boiler, I think—a wash-boiler and a kettle, as near as I can remember; I think there was one other article in the way of kitchen utensils.

Q. Can you recall anything else you were to put in that house that was not in it at the time the lease was signed?

Ans. No, sir.

Q. Any article of furniture?

Ans. No, sir.

Q. Are you quite sure of that?

Ans. Yes.

Q. Was all the furniture in the house that was to be used in it at the time you signed the lease?

A. Yes, sir; I think it was all there.

Q. Just reflect a moment, Mrs. Deen; it is a good while ago and you may have forgetten something; what I wish to know is whether all the articles of furniture, other than you have named, were in the house at the time the lease was signed?

A. There may have been one or two articles or two or three articles that were not in the house at the time, but which were out being repaired.

49 Q. That is what I want to call your attention to—the articles of furniture out being repaired. Now, what were those articles?

A. I think there was a lounge.

Q. What else?

A. I don't think of anything else.

Q. Was not there a bureau or dressing case?

Ans. No, sir.

Q. Nothing but the lounge; you are quite sure?

A. I am not sure, but there may have been a table; I am not positive.

Q. Where were these articles being repaired?

A. In a place on Sixth avenue.

Q. Who sent them there?

Ans. I did.

Q. How long before the lease was signed did you send them there?

A. It may have been ten days; I do not remember exactly how long it was these things were sent to be repaired; I sent a few things to be repaired, and they were all sent home but the lounge and a table, I think.

Q. Did you not state to Mrs. Perry that these things were
50 out being repaired?

A. No, sir; I never said anything was out being repaired; she never asked the question.

Q. Did she know those things were out being repaired?

A. I do not suppose she did; I did not tell her; there was nothing said about any furniture being out for repairs.

Q. Are you sure?

Ans. Yes.

Q. Was the house very well furnished?

A. I do not know what she might call furnished; it was furnished just as it was, and she saw how it was furnished and took it in that condition.

Q. What is your judgment about it?

A. I have not any judgment; I might think one thing about a house being furnished and another person might think another thing; it was just as I had furnished it for myself, with the exception of the piano and a few articles I took away
51 when I first left the house.

Q. Was it furnished throughout?

A. No, sir; it was furnished just as I had it furnished with that exception.

Q. Tell us what rooms were furnished.

A. That depends upon what people call furnished.

Q. It depends upon what Mrs. Deen calls furnished. Now, I want your knowledge and judgment about it.

A. What I might call furnished some other people call unfurnished; I furnished it as I occupied it for myself.

Q. You will tell me or you will not tell me what rooms were furnished in that house according to your idea of furnishing. If you will not tell me I will pass on.

A. Some of the furniture had been changed. Other parties had occupied the house, and had changed the furniture around in different rooms. I rented the house to Mrs. Perry just as it was, and she saw it.

52 Q. What rooms were furnished in that house at that time? Were they fully furnished or partially furnished?

A. Just as the inventory says; just as the inventory calls for.

Q. Won't you tell me?

A. I cannot tell you anything further as to how they were furnished.

Q. Was the use of the furniture worth anything in that house?

A. The use of the whole furniture?

Q. How much was it worth?

A. I cannot tell; I don't know how much; that is beyond my

comprehension; I do not know how much the use of it would be worth.

Q. What would you have asked for the house unfurnished as compared with it furnished?

A. I can't tell; that would depend entirely on circumstances.

Plaintiff's counsel objected to the last question on the ground that it is immaterial.

53 The court excluded the question, to which ruling the defendant then and there duly excepted.

Q. Was the house worth considerably more furnished than unfurnished at the time the lease was executed?

A. I could not answer that, as I do not know how much I could have rented it for unfurnished.

Q. Was it worth more furnished than unfurnished?

A. It is generally considered a house is worth more furnished, but sometimes it does not let for any more.

Q. What did you consider it at that time?

A. I had no consideration about it.

Plaintiff's counsel then called SAMUEL D. BURCHARD, who, being duly sworn, testified as follows:

54 I have been a clergyman in New York city for over 40 years; am president of the Rutgers Female College and have a pastoral charge; know the plaintiff; know the house No. 4 East 30th street, New York city; passed the house about 9 o'clock in March, 1874.

Q. What attracted your attention to the house?

Counsel for defendant objected to the question as being immaterial and irrelevant. Counsel for plaintiff proposed to show that the attention of the witness was called to the house in question by the presence of and salutations from unchaste females on the steps.

The court ruled that the evidence was admissible as going to show that plaintiff found the house abandoned by Mrs. Perry when she retook possession.

Defendant then and there duly excepted to such ruling.

55 A. I was passing the house about nine o'clock, and my attention was attracted to the house especially by the fact that there were some three or four females on the stoop and on the steps. The door was open, and they were inviting me to walk in and have a good time. Of course, that made an impression on my mind.

Defendant's counsel objected to the last part of the answer. The court overruled the objection; to which ruling the defendant then and there excepted.

(The WITNESS:) It was more than an impression—it was a conviction.

Defendant's counsel renewed his objection. The court overruled the objection, and defendant's counsel duly excepted.

56 Q. Was the language addressed to you improper?
A. It was improper.
Q. It was such as would not have been used by ladies?
Ans. Yes, sir.
Q. Did you communicate this fact to Mrs. Deen?
A. I first communicated it to my wife and then to Mrs. Deen.

Plaintiff's counsel offered in evidence the paper heretofore marked "Exhibit A, for identification." It was admitted in evidence and marked Pl'ff's Exhibit No. 4, and is as follows:

57 NEW YORK, *March* 27, 1874.

DEAR SIR: As Mrs. Perry appears to have abandoned the house No. 4 East 30th street to the man John, and I am informed that there is great danger of the furniture being injured, removed, and lost, I shall, in order to protect the property, take possession of the premises on the 1st day of April next and rent them for the remainder of the term on her account, and look to her and you for any deficiency in rent and expenses in reletting, as well as for all damages that I may have sustained by reason of the loss of or injury to the furniture up to that date. If you have any objection to my taking possession of the premises, be kind enough to inform me by letter, addressed to the care of James K. Hill, 62 Wall street, New York city.

Y'rs, &c., A. M. DEEN.

57½–8 Plaintiff's counsel then called Oliver E. Lipman, who, being duly sworn, testified on plaintiff's behalf that he had made up the account of rent reserved in the lease to Mrs. Perry in evidence and interest thereon; that he had credited the amount received thereon from defendant and the amount received from Mr. Sherman under the lease to him from Mrs. Deen in evidence and interest thereon, and that the balance due on May 14, 1883, giving these credits, was the sum of $12,732.27.

The plaintiff then rested.

59 The defendant, to maintain and prove the issue on his part, called Frank Wilson, who, being duly sworn, testified on defendant's behalf that he was twice at the house which was the subject of the rent. He was asked to state what occurred between the parties the first time he was there, and which was prior to the execution of the lease.

Plaintiff's counsel objected to any evidence of what occurred prior to the execution of the lease, on the ground that it all merged in the lease.

Defendant's counsel offered to show that certain representations were made by the plaintiff as to the amount of furniture which was to be put into the house, and which representations were made without the intentions of fulfilling them.

The objection of plaintiff's counsel was sustained, and the court re-

fused to admit the evidence offered by the defendant, upon the objection of the plaintiff; to which ruling the defendant's counsel then and there duly excepted.

60 Defendant's counsel then called Mary C. C. Perry, who, being duly sworn, testified on behalf of defendant as follows:

I recollect when the paper called a lease was executed.

Q. State what took place between you and Mrs. Deen previous to and at the time of the execution of that paper.

A. When I first saw Mrs. Deen I went to her house in 30th street. I was looking for a handsome house for a private first-class boarding-house. I went with Mr. Frank Wilson house-hunting, and a lady friend told me of this Mrs. Deen's house. I went there and I saw her first there. I went through the house. I liked it very much. It was just what suited me, except it was not furnished.

Q. What occurred at the time of the execution of that paper?

A. Mrs. Deen had agreed with me, after we had seen it through several times, to meet me at Mr. Wilson's house, 7 St. Luke's Place. She came there and brought the lease with her. Mr. Wilson
61 took it from her and read it in the presence of his wife and myself in the parlor, and when he came to the words dwelling-house he said: "Mrs. Perry, does Mrs. Deen understand thoroughly what you want this house for?" I said, "Yes, sir; she does; that I want a first-class private boarding-house," and Mrs. Deen made reply that she knew that I wanted it for a boarding-house, and that she had merely had it made out in that way; that she did not want the house to be represented as a place of business. Then when Mr. Wilson came to the part of the lease where it said "furniture therein" he says: "Have you gone over the house, Mrs. Perry, and seen that everything is complete?" I said, "Yes; I have. There is furniture wanting in such and such rooms. Mrs. Deen says this furniture is out to be repaired & cleaned, and she would make everything complete for me on the first of November." She then and there, before Mr. Wilson, promised the same thing,
62 and said the furniture was being repaired and cleaned; that a former tenant had completely destroyed almost everything, and in consequence of that she had to give the furniture out, but that everything would be in complete order the first of November. On the first of November I went to take possession of the house, between 11 and 12 o'clock.

Q. State what took place at the time the paper was signed by you and Mr. Wilson.

A. Mr. Wilson and myself signed the lease. Mr. Wilson first objected to signing in consequence of the furniture not being in. He said that he did not understand these things, and we had better wait until his son Frank came home. And then Mrs. Deen said that she would make everything right, and she would have the furniture and everything in complete order; that both herself and her husband had taken great interest in me, and would see that everything
63 was right. Then Mr. Wilson, under that promise, signed the lease, and I signed it.

Q. Where was the paper when you signed it?
Ans. On the piano.
Q. Who signed it last?
A. That I can't remember.
Q. What became of the paper after the last person signed it?
A. It laid on the piano, and Mr. Wilson went upstairs and got a check and a receipt, and Mrs. Deen took the receipt. Before signing it she said she never signed a paper without reading it, and took it to the window and then came back to the piano, and she took her check and she took her document off of the piano.
Q. The lease?
Ans. Yes, sir.
Q. What did she do with it?
A. Took it away with her.
Q. Was anything else said at the time of signing that paper in regard to the condition of the house?

Plaintiff's counsel objected to the question because it called for what took place before the lease was signed. The court sustained the objection.

64 [A.] Nothing was said in regard to the lease not being operative before the furniture was put in.
Q. Have you stated all that occurred at that time?
A. There were other promises that Mrs. Deen made of introducing me to Dr. Sayer, on the opposite side of the street, who had a great many patients who came to the city and wanted board, and she would introduce me to him, so I would get some boarders from him.
Q. Did you execute that paper relying upon these promises?

Plaintiff objected to the question. The court excluded it, and defendant then and there duly excepted to such ruling.

Q. Would you have executed that paper if Mrs. Deen had not promised what you say she promised?

65 Question objected to by plaintiff. The court excludes the question; to which ruling the defendant then and there duly excepted.

Q. State whether Mrs. Deen fulfilled those promises, and, if so, which of them that she made to you before you signed that paper.

Objected to by plaintiff as immaterial. The court sustained the objection and excluded the question, and defendant then and there duly excepted.

Q. What promises, if any, did Mrs. Deen afterwards fulfill that she had made to you, and which induced you to sign that lease?

Objected to. The court sustained the objection and excluded the question, and defendant then and there excepted.

Q. Did you have any conversation with Mrs. Deen after the signing of this lease in regard to the fulfillment of her promises?
Ans. Yes, sir.

Q. When did [you] have the first one?

66 A. On the first of November, between 11 and 12 o'clock. I went to take possession of the house. I waited until nearly one o'clock in the parlor for Mrs. Deen before she came downstairs.

Plaintiff's counsel objects to any conversation between Mrs. Deen and this witness at that date as incompetent.

Defendant's counsel proposes to show from the conduct of Mrs. Deen after the paper was signed and from what she said subsequently that she did not intend to fulfill the promises made in regard to furniture when she made them, and that she made them for the purpose of procuring the signature of the tenant and the surety to the lease.

Plaintiff's counsel objected to any testimony under such offers. The court excluded the declarations of Mrs. Deen in regard to excuses for not putting in furniture, and defendant then and there duly excepted to such ruling & exclusion.

67 Defendant's counsel offers in evidence the judgment-book of the marine court of the city of New York, showing that on March 12th, 1874, judgment was docketed in favor of William M. Wilson against Ann Maria Deen for $55.91.

Admitted.

Plaintiff's counsel also offers in evidence the judgment-roll in the action in the marine court, Ann Maria Deen against William M. Wilson, filed March 12th, 1874.

It is admitted that it is the judgment-roll on that action taken from the files of the court.

It is admitted in evidence and is as follows:

68 *Summons for a Money Demand on Contract.*

Marine Court of the City of New York.

ANN MARIA DEEN Plaintiff,
against
WILLIAM M. WILSON, Defendant.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 62 Wall street, New York city, within six days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will take judgment against you for the sum of four hundred & fifty dollars, with interest from the 1st day of December, one thousand eight hundred and seventy-three, besides the costs of this action.

Dated New York, Dec. 9th, 1873.

JAS. K. HILL,
Plaintiff's Attorney.

69 Marine Court of the City of New York.

ANN MARIA DEEN *vs.* WILLIAM M. WILSON.

The plaintiff complains and avers—

First. That on the 29th day of October, 1873, at the city of New York, one Mary C. C. Perry hired and leased from the plaintiff for the term of two years and ten months from the first day of November, 1873, the house known as number 4 East 30th street, in the city of New York, with the furniture therein, at the rent or sum of $450 per month, payable on the first day of each month, in advance.

Second. That at the same time and place the defendant agreed, in consideration of the letting of the said premises to the said Mary C. C. Perry, *that* if default should at any time be made in the payment of the said rent, to pay the same.

Third. That the said Mary C. C. Perry has made default in
70 the payment of the rent for the month commencing on the 1st day of December, 1873.

Fourth. That the defendant has not paid the same.

Wherefore the plaintiff demands judgment for the sum of $450, with interest from the 1st day of December, 1873, damages, and the costs and disbursements of this action.

JAMES K. HILL,
Pl'ff's Att'y, 62 Wall St.

71 Marine Court, City of New York.

ANN MARIA DEEN Pl't'ff, *ag'st* WILLIAM M. WILSON.

The above-named defendant, for answer to the complaint in this action, respectfully shows:

First. He denies generally & specifically each & every allegation in said complaint contained.

Second. For a second, separate, several, & distinct defense in said action defendant shows that on or about the 29th day of October, 1873, the plaintiff, by false & fraudulent statements, obtained the signature of Mary C. C. Perry & of this defendant to a paper purporting to be a lease of the premises described in the complaint; that the said Mary C. C. Perry & this defendant were both misled by the said false representations, and that the said Mary C. C. Perry & this defendant were induced by their belief in the truth of said representations to sign the said paper.

Wherefore defendant demands judgment that the said
72 paper or lease be delivered up to said plaintiff & cancelled, & that the defendant recover from plaintiff his costs in this action, &, further, that the complaint herein be dismissed.

JOHN CHETWOOD,
Def't's Att'y.

CITY & COUNTY OF NEW YORK, *ss:*

William M. Wilson, being duly swo-n, says that he is the defendant in this action; that he has read the foregoing answer, & that the same is true of his own knowledge, except as to the matters therein

stated on information & belief, & as to those matters he believes it to be true.

W. M. WILSON.

Sworn before me this Dec'r 13, 1873.

ADAM GOS,
Notary Public, N. Y. Co.

73 At a trial term of the marine court of the city of New York held at the city hall, in the city of New York, on the 6th day of February, A. D. 1874.

Present: Judge Alker, *J.*

Verdict.

ANNE MARIA DEEN *against* WILLIAM M. WILSON.

The court charge the jury, who say that they find a verdict for def't, with costs & $25 allo.

Xtract from the minutes.

M. J. POWER, *Clerk.*

74 Marine Court of the City of New York.

ANNE MARIA DEEN, Pl't'ff, *ag'st* WILLIAM M. WILSON, Def't.

The issues in this action having been brought on for trial before the Hon. Henry Alker, one of the judges of this court, and a jury, at a trial term of said court held on the 9th day of February, 1874, & the issues having been tried and a verdict for the defendant having been duly rendered on the 9th day of February, 1874, & his costs having been adjusted at $55.91—

It is ordered & adjudged that the said defendant, William M. Wilson, do recover from & have judgment against said plaintiff, Ann Maria Deen, for the said sum of fifty-five $\frac{91}{100}$ dollars, costs herein.

MAURICE J. POWER, *Clerk.*

75 *Costs for Defendant.*

Marine Court.

ANNE MARIA DEEN, Pl't'ff, *ag'st* WILLIAM M. WILSON, D'f'd't.

Costs by statute	20	00
Allowance	25	00
Disbursements:		
Affidavits		50
Witnesses	8	50
Entering judgment	1	00
Minutes		10
Transcript		12
Execution		69
	55	91

Costs taxed @ 55.91. March 12, 74. M. J. P., clerk.

CITY & COUNTY OF NEW YORK, *ss.:*

John Chetwood, being duly sworn, says that he is defendant's attorney in above action; that the above disbursements have been actually paid in this action, or will be necessarily incurred therein.

JOHN CHETWOOD.

Sworn before me this March 12, '74.

ADAM GOS,
Notary Public.

76 [Endorsed:] Marine court. Anne Maria Deen *v.* William M. Wilson. Judgment-roll. Filed March 12, '74, 11.30 a. m.

77 Defendant's counsel then called WILLIAM M. WILSON, the defendant, who, being duly sworn, testified that he is the surety on the lease and was present at the trial in the marine court of the action brought by Mrs. Deen for the first month's rent.

Q. What was the question tried?

Objected to by plaintiff's counsel, who, after colloquy with defendant's counsel, admitted that the only issue tried in that action was that of fraud in procuring the lease; that there was no issue as to the payment of the rent or as to the delivery of the lease, and the witness was withdrawn.

Defendant rested.

The plaintiff thereupon proved that after the rendition of said verdict and the entry of said judgment in the marine court the said Wilson and the said Perry brought a bill in equity before the Supreme court of the State of New York against the plaintiff to set aside and annul said lease.

78 Defendant's counsel then called ANNIE BALDWIN, who, being duly sworn, testified as follows on defendant's behalf:

I reside at St. Mark's Hotel, Staten Island. In the fall of 1873 I lived at 343 Fifth avenue. I kept boarders—that is, I took families to board. I know Mrs. Perry and Mrs. Deen. I met them in Mrs. Deen's house for the first time—in the house that Mrs. Perry was to take in a day or two. I saw them both there in the fall of 1873.

Q. For what purpose did you go there?

A. I went there to hire a floor for a family that was coming in town. On going to the house I saw both Mrs. Deen and Mrs. Perry.

Q. Did you have any conversation with them?

A. I went in and asked which was the lady who was going to take boarders or had hired the house for that purpose. Both ladies
79 stood up. They were sitting on the sofa with something in their hands, and Mrs Deen says: "I am the person who is to take the house." The other lady stood up and said nothing.

Q. You say Mrs. Deen said so?

A. Mrs. Perry says: "I am about to take possession of this house, but I have not possession of it yet." She looked at Mrs. Deen, as much as—you know—referred me to Mrs. Deen, and I told what I wanted—one room on the parlor floor for a lame lady, and the

second floor for a party that was coming in the next Saturday. I asked her if I could see the rooms. Mrs. Perry says: "I have not taken possession yet." Then I said: "I suppose I can't see the rooms?" She looked at Mrs. Deen, & Mrs. Deen says: "Yes; I will go with you." Both ladies went with me.

Q. Where did you go first?

A. I think, to the best of my knowledge, I went first on the parlor floor to what was the dining-room—the extension room.

80 There was no furniture. I said: "This lady must have furniture." Mrs. Deen says: "This was a dining-room."

(Plaintiff's counsel objected to the testimony upon the ground that it was incompetent, and also because the defendant had closed his case on the preceding Friday, and that the plaintiff's witnesses had been dismissed.

The court excluded the testimony because it was immaterial in regard to the question respecting the judgment of the Marine court and upon every other issue. The defendant had rested and closed his case in the preceding week.

Defendant's counsel moves to amend the answer by setting up that the plaintiff failed to supply the house in question with certain furniture necessary for its use and occupancy by the tenant;

81 that she made an agreement to supply such furniture at the time of the execution and delivery of the lease; that damages were sustained because of such breach of agreement on the part of the landlady, and by asking that such damages be allowed as a counter-claim.

The court denied the motion; to which ruling the defendant then and there excepted.)

It was admitted that plaintiff appealed from the judgment in the action in the Marine court, and filed an undertaking on appeal, as required by law.

82 The plaintiff's counsel here offered in evidence the remittitur from the court of appeals in the case af William M. Wilson and Mary C. C. Perry against Ann Maria Deen, and the order of the Supreme Court thereon. The same were received in evidence, and are as follows:

83 *Summons for Relief.*

N. Y. Supreme Court.

WILLIAM M. WILSON, MARY C. C. PERRY, Plaintiffs,

ag'st

ANN MARIA DEEN, Defendant.

CITY AND COUNTY OF NEW YORK:

To the defendant:

You are hereby summoned and required to answer the complaint

in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 74 Broadway, New York city, within twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated March 11, 1874.

JOHN CHETWOOD,
Plaintiff's Attorney.

84 Supreme Court, City and County of New York.

WILLIAM M. WILSON and MARY C. C. PERRY, Plaintiffs,
against
ANN MARIA DEEN, Defendant.

CITY AND COUNTY OF NEW YORK:

The complaint of above-named plaintiffs respectfully show to the court that they reside in the city of New York, and that the defendant is a resident of the township of Summit, in the State of New Jersey, and is owner of the dwelling-house and premises known as No. 4 East 30th street, in said city of New York, and of the furniture therein.

That in the month of October last the plaintiff, Mary C. C. Perry, was looking for a completely furnished dwelling-house in said city of New York, desiring to hire the same to be kept by her as a boarding-house.

That in the course of her search she called at the house No. 4 East 30th street, and found there the defendant, whom she had never before seen.

That she there stated her business to the said defendant, and was by her shown through the said house; that W. Frank Wilson, the son of her coplaintiff, also accompanied her and was also shown through the said house; that on going through the various rooms
85 the said Mary C. C. Perry and the said W. Frank Wilson saw that many of them were not furnished, some having little or no furniture; that they called defendant's attention to that fact, and defendant thereupon told them that the missing furniture was out being repaired and would be replaced in said house by the first day of November then next.

That thereupon, relying upon such statements and believing the same to be true, the said Mary C. C. Perry agreed to hire the said premises fully and completely furnished, to be used by her as a first-class boarding-house for the term of two years and ten months from the first day of November, 1873, at the annual rent of five thousand

four hundred dollars, payable monthly in advance, and offered William M. Wilson, the plaintiff, as her surety upon the lease to be executed in pursuance of said agreement, surety being then and there required by the defendant.

That pursuant to such agreement the defendant met the plaintiffs at the house of said William M. Wilson, No. 7 St. Luke's Place, in the city of New York, on the 29th day of October last, and the defendant then and there produced a paper drawn up and purporting to be an embodiment of the agreement hereinbefore set forth, and a lease of the premises No. 4 East 30th street, in said city,
86 upon the terms and conditions agreed upon between the defendant and the plaintiff, Mary C. C. Perry.

That said William M. Wilson, upon inspecting said paper, made objections thereto, and then and there demurred to execute it. That he enquired of Mrs. Perry, in the presence of defendant, whether the said house was completely furnished and ready for occupancy as a boarding-house. That Mrs. Perry replied in the negative, but added that defendant had promised to have the furniture all in the house and everything complete on the first day of November then next, then assented to Mrs. Perry's statement, and reiterated the same.

That said plaintiff thereupon said to the defendant that the said house and furniture must be complete in every particular and ready on the first of November, 1873, to be used as a boarding-house.

That Mrs. Perry had no money to supply deficiencies; that Mrs. Deen, the defendant, thereupon replied that she had taken a great fancy to Mrs. Perry; that the said house and furniture should be made ready and complete in every respect by the first day of
87 November then next, and that everything therein should be made perfectly satisfactory to Mrs. Perry. That defendant was very urgent to have the lease signed at once, and in consequence of her persistent, repeated requests, and relying entirely upon the positive promises and undertakings of the said defendant to have the said house fully and completely furnished and ready in all respects to the satisfaction of said Mary C. C. Perry, to be used and occupied by her as a first-class boarding-house, from and after the first day of November, 1873, and believing in the truth of the representations as to the furniture belonging to said house, then and before that time made and reiterated by said defendant, Ann Maria Deen, to said William M. Wilson to his son, W. Frank Wilson, and to said Mary C. C. Perry, the said plaintiffs then and there signed the said paper produced to them by the said defendant (which they pray may be produced before this honorable court upon the trial of this action), and left one copy of the same with defendant to be completed by adding thereto an inventory of the furniture referred to in said proposed lease, to be rented with said house, which inventory was to include complete furniture for every part of said house except one room to be attached to said proposed lease, and to be signed by the parties thereto.

That thereupon, in anticipation of the proper completion and delivery of said lease and of the possession of said premises, furnished as agreed upon by said defendant, on the first day of November, 1873, and relying upon the promises of said defendant
88 in that behalf, the plaintiff, Mary C. C. Perry, paid to the defendant the sum of four hundred and fifty dollars, which would have been the rent of said house and furniture for the month of November, 1873, if said lease had been completed and delivered and possession of said premises and furniture given thereunder as agreed by said defendant.

And the plaintiffs allege that defendant did not execute or deliver said lease and inventory, and did not complete the furnishing of said house.

That on the first day of November the said Mary C. C. Perry went to the said house, No. 4 East 30th St., in the city of New York, to take possession of the same, completely furnished, according to the tenor of said agreement.

That she then found the house still only partially furnished.

That the defendant put her off with some excuse.

That thereupon and thereafter Mrs. Perry called at the
89 said house every day until and including the seventh day of the said month of November, 1873, demanded possession of the same duly furnished according to said agreement, and received every day from defendant promises and excuses in reference to the missing furniture. That on Friday, the seventh day of November, 1873, the said Mary C. C. Perry found said house still only partly furnished, and she then told defendant that she could not wait any longer for said premises and furniture and said lease and inventory, and said house never to this day has been furnished according to agreement.

That thereupon, on December, 1873, said Ann Maria Deen commenced an action in the Marine court of this city to recover $450 as rent of said premises for said month of December against the plaintiff, William M. Wilson, as surety on said alleged lease. That said Wilson appeared and answered in said action, and set up in his answer the fraud and misrepresentation above set forth as his sole defense therein.

That said action came on for trial upon the said issue of fraud and misrepresentation raised by the answer before Hon. Henry Alker and a jury on the 6th day of February last, and a verdict was therein rendered against the said Ann Maria Deen, the plaintiff in said action. That pending the trial of said action another suit was commenced in the same court against said William M. Wilson for the alleged amount of rent due for the month of January, 1874. That said Ann Maria Deen intends appealing in the action first named
to the General Term of said Marine court, and has made a
90 motion therein for a new trial, which was denied, and has

obtained an extension of time to make a case from defendant's attorney on account of delay in obtaining the minutes of the trial.

And plaintiffs further show that neither the said William M. Wilson nor the said Mary C. C. Perry have or ever had possession of the said house, No. 4 East 30th street, in the city of New York, nor of the furniture therein, but said house and furniture is and ever since October 29th, 1873, has been, in the possession of the said defendant, Ann Maria Deen.

Wherefore plaintiffs demand judgment against defendant—

1st. That said paper hereinbefore referred to and alleged to be a lease of the premises No. 4 East 30th street, in the city of New York, bearing date October 29th, 1873, and signed by the plaintiffs and this defendant, be forthwith delivered up to plaintiffs and cancelled.

2d. That an injunction do forthwith issue in this action
91 to the said Ann Maria Deen, her servants, attorneys, and agents, to be directed, enjoining and forbidding them, or either or any of them, from further prosecuting the two actions heretofore commenced to collect rent under said alleged lease, as hereinbefore set forth, and that all proceedings therein be stayed until the further order of this court, and that they and each of them be further enjoined and prevented from commencing any new actions upon or under the said alleged lease above referred to, or for any rent claimed thereunder during the pending of this action.

3rd. That plaintiffs have such further order and relief herein as may be equitable and just or the necessity of the case may require, besides the costs and disbursements of this action.

JOHN CHETWOOD,
Pl'ffs' Att'y.

CITY AND COUNTY OF NEW YORK, *ss:*

William M. Wilson and Mary C. C. Perry, being severally duly sworn, say that they are the plaintiffs in this action; that they have read the foregoing complaint; that the same is true of their own knowledge, except as to the matters stated therein on information and belief, and as to those matters they believe it to be true.

W. M. WILSON.
MARY C. C. PERRY.

Sworn to before me this March 11th, 1874.

ADAM GOS,
Notary Public, N. Y. Co.

92 Supreme Court, City and County of New York.

WILLIAM M. WILSON and MARY C. C. PERRY

against

ANN MARIA DEEN.

CITY AND COUNTY OF NEW YORK:

The defendant appearing in this action and answering the amended complaint of the plaintiffs—

Admits that the plaintiffs reside in the city of New York; that the defendant is a resident of Summit, in the State of New Jersey, and is owner of the dwelling-house and premises known as No. 4 East 30th street, in the city of New York, and of the furniture therein.

And she, further answering, says that in the latter part of October, 1873, the plaintiff, Mary C. C. Perry, called at and examined the said house and furniture a number of times, and after such examinations agreed to rent the same for the term of two years and ten months from the first day of November, 1873, for the rent of $450 per month, payable on the first day of each month in advance, to be used as a dwelling-house, and that afterwards and on the 29th day of October, 1873, at the house of the plaintiff, William M. Wilson, No. 7 St. Luke's Place, in said city, the defendant and the plaintiff, Mary C. C. Perry, as principal, and the plaintiff, William M. Wilson, as surety, executed a lease in duplicate, one of

93 which was taken by the defendant and the other of which was taken by the said Perry, and a copy of which said lease is hereunto annexed, marked Exhibit "A," and forms a part of this answer.

That afterwards and on the said 29th day of October, 1873, the said Perry paid the defendant $450 for one month's rent of the said premises, and afterwards, on the same day, by permission of the defendant, took possession thereof.

The defendant further says that on the first day of November, 1873, a schedule was made of the furniture in the said house, but, with the consent and approval of the plaintiff, Mary C. C. Perry, was retained by the defendant, and was not annexed to the said lease, and that the defendant has alway been ready and willing to annex the said schedule.

The defendant further says that, in addition to the furniture in the said house, she promised the said Perry to put therein a set of French china, seven comfortables, seven pair of blankets, and three or four articles of kitchen utensils.

The defendant further says that on the ninth day of December, 1873, she commenced an action in the Marine court of the city of New York against the plaintiff, William M. Wilson, as alleged in

the complaint herein, and that he appeared and answered therein, and alleged in his answer, after denying the execution of the said lease, as surety, that the signatures of the said Perry and himself had been obtained by the false and fraudulent statements of this defendant. That the said action came on for trial before the Honorable Henry Alker and a jury on the sixth day of February, 1874, and resulted in a verdict against the plaintiff therein, and in favor of the said William M. Wilson, on which judgment was after-
94 wards entered for $55.91, costs.

That this defendant appealed from the said judgment to the General Term of the said Marine court, and that a proposed case on appeal was served on the 12th day of March, 1874, and the said appeal duly perfected on the 17th day of that month, and is now pending undetermined. That a motion for a new trial was made in said action and denied by the court.

The defendant further says, upon information and belief, that it was held and decided by the court, on said trial, that the said William M. Wilson could avail himself of every defence in said action that the said Mary C. C. Perry could have availed herself of had the action been brought against her as the tenant, and that no evidence offered by the defendant on said action upon the said trial was excluded by the court.

The defendant further says that on or about the third day of February, 1874, she commenced another action against the said Wilson, in the same court, for the month's rent due on the first day of January, 1874.

That the defendant appeared in said action and served his answer on or about the 14th day of February, and that no proceedings have since been had therein.

The defendant denies that the said Mary C. C. Perry has never had possession of the said house nor of the furniture therein, or that said house and furniture is, or at any time since the 29th
95 day of October, 1873, has been, in the possession of the defendant.

She further says that she has duly performed all the conditions of the said lease on her part to be performed, as well as the promise made by her, as hereinbefore stated.

Further answering, she denies each and every allegation of the complaint not hereinbefore specifically admitted or answered.

Wherefore the defendant demands judgment for the dismissal of the complaint and the costs and disbursements of this action.

JAMES K. HILL,
Att'y for Defendant, 37 and 39 Wall Street, N. Y.

CITY AND COUNTY OF NEW YORK, *ss:*

Ann Maria Deen, being duly sworn, says that she is the defendant in the above action; that she has read the foregoing answer and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated on information and belief, and that as to those matters she believes it to be true.

A. M. DEEN.

Sworn to before me this 27th day of March, 1874.

HENRY T. WING,
Notary Public, N. Y. City & Co.

96 EXHIBIT "A."

This indenture, made the 29th day of October, one thousand eight hundred and seventy-three, between Ann Maria Deen of the city of New York, party of the first part, and Mary C. C. Perry, of the same place, party of the second part, witnesseth: That the said party of the first part hath letten, and by these presents doth grant, demise, and *to* farm-let, unto the said party of the second part the house known as number 4 East Thirtieth street, in the city of New York, with the furniture therein, a schedule of which is to be made in duplicate upon the party of the second part taking possession of the premises, and to be annexed to this lease, to be used as a dwelling-house, and for no other purpose whatever, with the appurtenances, for the term of two years and ten months from the first day of November, one thousand eight hundred and seventy-three, at the rent or sum of four hundred and fifty dollars per month, payable on the first day of each month, in advance; and it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom. And the said party of the second part hereby covenants to pay to the said party of the first part the said rent as herein specified, and also to pay the regular annual rent or charge which is or may be assessed or imposed according to law upon the said premises for the Croton water on or before the first day of August in each year during the term, and if not so paid the
97 same shall be added to the month's rent then due.

And the said party of the second part further covenants that she will not assign this lease, nor let or underlet the whole or any part of the said premises, nor make any alteration therein, without the written consent of the said party of the first part, under the penalty of forfeiture and damages, and that she will not occupy

or use the said premises, nor permit the same to be occupied or used for any business deemed extra hazardous, on account of fire or otherwise, without the like consent under the like penalty.

And the said party of the second part further covenants that she will permit the said party of the first part, or her agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term will permit the usual notice of "To let" or "For sale" to be placed upon the walls or doors of said premises and remain thereon without hindrance or molestation.

And it is further agreed between the parties to these presents that in case the building or buildings erected on the premises hereby leased shall be partially damaged by fire the same shall be repaired as speedily as possible at the expense of the said party of the first part; that in case the damage shall be so extensive as to render the building untenantable the rent shall cease until such time as the building shall be put into complete repairs, but in case of the total destruction of the premises by fire or otherwise the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end: Pro-
98 vided, however, That such damage or destruction be not caused by the carelessness, negligence, or improper conduct of the party of the second part, her agents or servants.

And that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised and the said furniture in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And it is further understood and agreed that the said party of the second part shall make all repairs that may become necessary during the continuance of the term hereby demised, and leave the furnace and range in good repair and condition.

And the said party of the first part doth covenant that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

ANN MARIA DEEN. [L. S.]
MARY C. C. PERRY. [L. S.]

Sealed and delivered in the presence of—

——— ———.

In consideration of the letting of the premises within men-
99 tioned to the within-named Mary C. C. Perry, and the sum of one dollar to me paid by the said party of the first part, I, William M. Wilson, do hereby covenant and agree to and with the party of the first part above named and her legal repre-

sentatives that, if default shall at any time be made by the said Mary C. C. Perry in the payment of the rent and performance of the covenants contained in the within lease on her part to be paid and performed, *that* I will well and truly pay the said rent or any arrears thereof that may remain due unto the said party of the first part, and also all damages that may arise in consequence of the non-performance of said covenants or either of them, without requiring notice of any such default from the said party of the first part.

Witness my hand and seal this 29th day of October, in the year one thousand eight hundred and seventy-three.

WM. M. WILSON. [L. S.]

Witness:

——— ———.

100 *Findings of Fact and Law.*

Supreme Court, Special Term.

WILLIAM M. WILSON & MARY C. C. PERRY, Plaintiffs

against

ANNA MARIA DEEN, Defendant.

I, Charles H. Van Brunt, the justice at special term before whom the above action was tried, do find as matters of fact:

1. That on or about the twenty-seventh day of October, 1873, the plaintiff, Mary C. C. Perry, applied to the defendant to hire the house No. 4 East 30th street, in the city of New York, furnished, for the purpose of taking boarders therein for the term of two years and ten months from November 1st, 1873.

2. That as a part of the contract of letting of said house and furniture said defendant agreed that certain deficiencies in furniture should be made up, and the house completely furnished, except one room, on the first day of November, 1873.

3. That in pursuance of said agreement the defendant produced a written lease, and she and the plaintiffs signed and executed the said lease by and under their respective hands and seals on the twenty-ninth day of October, 1873, and paid $450, the first month's rent, in cash in advance.

101 4th. That, by the provisions of the lease, a schedule of the furniture was to be prepared and thereto annexed upon the plaintiff, Mary C. C. Perry, taking possession of the premises; that no such schedule was annexed as provided, and said Mary C. C. Perry never did take possession of said premises as tenant under said lease.

5th. That the said Anna Maria Deen signed said lease as lessor, the said Mary C. C. Perry as lessee, and the said William M. Wilson as surety; and at the time of signing the same the defendant was expressly notified that Mary C. C. Perry intended to use the house and furniture for a boarding-house, and to occupy the same as such on the first day of November then next, and was further then and there notified that the said Mary C. C. Perry had no means to supply deficiencies in said furniture.

6th. That said Anna Maria Deen then and there expressly promised and agreed to and with the plaintiffs that she would make good and supply the deficiencies in furniture in said house and have the same completely furnished (except one room) to the satisfaction of said Mary C. C. Perry on the first day of November, 1873.

7th. That there were at that time great deficiencies in the furniture of said house, as said Anna Maria Deen well knew, and her attention had been expressly called to such deficiencies by said Mary C. C. Perry in the different rooms where such deficiencies existed.

8th. That said Anna Maria Deen never did make up said deficiencies in furniture according to her agreement, although often requested so to do by said Mary C. C. Perry; and that said Mary C. C. Perry, after waiting until the seventh day of November,
102 1873, refused to accept said house under said lease, and surrendered said lease by returning one of the duplicates thereof to the defendant on account of such breach of agreement by said Anna Maria Deen, and then and there left the premises in possession of said Anna Maria Deen.

And I do find as conclusions of law—

1. That there was a failure on the part of the defendant to furnish the consideration for the said agreement of letting.

2. That said lease never went into effect.

3. That the making good of certain substantial deficiences in the furniture of said house on or before the first day of November, 1873, by the defendant was a condition precedent to be performed by the defendant, without which the lease did not take effect or become operative, and such lease never has taken effect, by reason of the failure on the part of the defendant to perform such condition precedent; that said lease, being null and void, should be delivered up to be cancelled.

4. That said Anna Maria Deen having made certain promises and agreements at the time of the signing of said lease as an inducement to such signing which were not performed by her and the performance of which was not waived, the lease so signed was invalid and void.

5. That the plaintiffs herein should have judgment for the return to them of said lease and cancellation thereof, besides their costs and disbursements in this action.

Dated March 1, 1875.

C. H. VAN BRUNT.

103 (Endorsed:) Supreme court. William M. Wilson & an. ag'st Ann Maria Deen. Findings of fact & law. John Chetwood, att'y [for] pl'ffs, 74 B'way, N. Y. To James K. Hill, Esq., att'y [for] def't. Rec'd March 19, 1875.

104 Supreme Court.

WILLIAM M. WILSON & MARY C. C. PERRY, Plaintiffs,
ag'st
ANNA MARIA DEEN, Defendant.

CITY AND COUNTY OF NEW YORK:

The issues in this action having come on for trial before his honor Justice Charles H. Van Brunt at a special term of this court, held on the first Monday of December, 1874, and the said justice having found that the plaintiffs herein should have judgment for the return to them of the lease mentioned and described in the pleadings herein and the consideration thereof, besides the costs and disbursements in this action, and the costs of the plaintiffs herein having been duly taxed at the sum of one hundred and seventy-two dollars and four cents, now, on motion of John Chetwood, attorney for the plaintiffs—

It is ordered and adjudged that Anna Maria Deen, the defendant, return to William M. Wilson and Mary C. C. Perry, the plaintiffs, the lease mentioned and described in the pleadings herein, made by the said Anna Maria Deen to the said Mary C. C. Perry, bearing date the 29th day of October, 1873, and that the same be cancelled.

And it is further ordered and adjudged that the plaintiffs,
105 William M. Wilson and Mary C. C. Perry, recover of Anna Maria Deen, the defendant, the sum of one hundred & seventy-two dollars and four cents, their costs and disbursements, so taxed as aforesaid, and that they have execution therefor.

(Endorsed:) Supreme court. William M. Wilson *et al.* ag'st Anna Maria Deen. Judgment. John Chetwood, att'y [for] pl'ff, 74 Broadway, N. Y. Within is a copy of the judgment in above action, entered in the office of the N. Y. county clerk on this Feb'y 4th, 1876. John Chetwood, att'y [for] pl'ff. To J. K. Hill, Esq., att'y [for] def't. Rec'd Feb'y 4, 1876.

106 Supreme Court.

WILLIAM M. WILSON and MARY C. C. PERRY
vs.
ANNA MARIA DEEN.

SIRS: Please take notice that Anna Maria Deen, defendant above named, hereby appeals to the general term of this court from the judgment entered in the above action in the office of the clerk of the city and county of New York on the fourth day of February, 1876, directing the return to the plaintiffs of a certain lease bearing date the twenty-ninth day of October, 1873, mentioned and described in the complaint herein, and for the cancellation thereof, and directing that the plaintiffs recover of the defendant the sum of one hun-

dred and seventy-two $\frac{4}{100}$ dollars, costs and disbursements, and from every part thereof.

Yours, &c.,

JAS. K. HILL,
Att'y [for] Def't & App'l't, 62 Wall St., N. Y.

Dated N. Y., Feb'y 23rd, 1876.

To John Chetwood, Esq., att'y [for] pl'ffs & resp'd's, 74 Broadway, N. Y., & Wm. Walsh, Esq., clerk of city & county of New York.

107 (Endorsed:) Supreme court. William M. Wilson & Mary C. C. Perry against Anna Maria Deen. Notice of appeal. James K. Hill, att'y [for] def't, 62 Wall St., N. Y. Due and timely service of a copy [of] within notice of appeal is hereby admitted this 25th day of February, 1876. John Chetwood, att'y [for] pl'ffs.

108 At a general term of the supreme court of the State of New York for the first judicial department, held at the county court-house, in the city of New York, on the twelfth day of March, A. D. 1877.

Present: Hon. Noah Davis, presiding justice; Hon. Chas. Daniels, Hon. John R. Brady, associate justices.

WILLIAM M. WILSON and MARY C. C. PERRY, Pl't'ff, Resp'd'ts,
ag'st
ANN MARIA DEEN, Def't, App'l't.

The appeal from the judgment entered in the above action on the fourth day of February, 1874, directing the return by the defendant to the plaintiffs of a certain lease mentioned and described in the pleadings herein, and that plaintiffs recover of the defendant the sum of one hundred and seventy-two $\frac{4}{100}$ dollars, costs and disbursements, coming on to be heard at a general term of this court held on the 1st Monday of January, 1877:

Now, on motion of John Chetwood, attorney for the plaintiffs, respondents, after hearing James K. Hill, Esq., attorney for the defendant, appellant—

109 It is ordered that the judgment so as aforesaid appealed from be, and the same is hereby, in all things affirmed, with costs.

(Endorsed:) Supreme court. Wilson *vs.* Deen. General term order. John Chetwood, att'y [for] pl'ff, 74 Broadway, N. Y. The within is a copy of an order in above action entered on this 12th day of March, 1877. Y'rs, John Chetwood, att'y [for] pl'ff. To J. K. Hill, Esq., att'y [for] def't. Rec'd M'ch 13, 1877.

110 *Judgment.*

N. Y. Supreme Court.

WILLIAM M. WILSON and MARY C. C. PERRY, Plaintiffs,
against
ANN MARIA DEEN, Defendant.

CITY AND COUNTY OF NEW YORK:

The above-named defendant having appealed to the general term of the supreme court for the first judicial department from the judgment entered in the above-entitled action on the fourth day of February, 1874, wherein it was ordered and adjudged that the said defendant return to the above-named plaintiffs a certain lease in the pleadings herein mentioned and described and that the same be cancelled and that the said plaintiffs recover of the said defendant the sum of one hundred and seventy-two dollars and four cents, their costs and disbursements, and the said appeal having been heard at the general term held on the first Monday of January, 1877, and the said general term having ordered that the said judgment so appealed from be in all things affirmed, with costs, and the costs of the plaintiffs on such appeal having been duly taxed at the sum of ninety-three dollars and sixty cents:

Now, on motion of John Chetwood, the plaintiffs' attorney—

111 It is ordered that the judgment entered in this action on the fourth day of February, 1874, so appealed from as aforesaid, be, and the same is hereby, in all things affirmed.

And it is further ordered and adjudged that the said plaintiffs, William M. Wilson and Mary C. C. Perry, recover of the said Ann Maria Deen the sum of ninety-three dollars and sixty cents, their costs and disbursements on the said appeal so taxed as aforesaid, and that they have execution therefor.

Dated March 15th, 1877.

112 Supreme Court.

WILLIAM M. WILSON and MARY C. C. PERRY, Plaintiffs & Respondents,
against
ANN MARIA DEEN, Defendant & Appellant.

GENTLEMEN: Please take notice that the above-named defendant & appellant, Ann Maria Deen, hereby appeals to the court of appeals of the State of New York from the judgment entered in the above-entitled action in the office of the clerk of the city and county of New York on the 15th day of March, 1877, in favor of said plaintiffs & respondents and against said appellant for the sum of ninety-three $\frac{90}{100}$ dollars, costs on affirmance, and affirming the judgement entered herein on the 4th day of February, 1876, in favor of said respondents and against appellant for the sum of one hundred and seventy-two $\frac{4}{100}$ dollars, and directing the return to plaintiffs & re-

spondents of a certain lease bearing date the 29th day of October, 1873, and from every part thereof.

Yours, &c., JAS. K. HILL,
Att'y App'l't, 62 Wall St., N. Y. City.

Dated New York, April 25th, 1877.

113 To John Chetwood, Esq., att'y [for] pl'ffs & resp'd'ts, & Henry A. Gumbleton, Esq., clerk of city and county of New York.

(Endorsed:) Supreme court. William M. Wilson *et al.* ag'st Ann Maria Deen. Notice of appeal, Jas. K. Hill, att'y [for] app'l't, 62 Wall St. Due and timely service of a notice, of which the within is a copy, is hereby admitted. May 15, 1877. John Chetwood, att'y [for] resp'd'ts.

114 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 12th day of November, in the year of our Lord one thousand eight hundred and seventy-eight, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge, presiding.

E. O. PERRINE, *Clerk.*

Remittitur Nov. 13th, 1878.

WILLIAM M. WILSON & Ano., Respd't's, *ag'st* ANN MARIA DEEN.

Be it remembered that on the 30th day of June, in the year of our Lord one thousand eight hundred and seventy-seven, Ann Maria Deen, the appellant in this action, came here into the court of appeals by Jas. K. Hill, her attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York. And William M. Wilson & ano., the respondents in said action, afterwards appeared in said court of appeals, by John Chetwood, their attorney, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

115 Whereupon the said court of appeals, having heard this cause argued by Mr. Sam'l Hand, of counsel for the appellant, and Mr. B. C. Chetwood, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be reversed, annulled, and altogether held for nothing. And it was further ordered and adjudged that a new trial be granted in this action, costs to abide the event thereof.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed, annulled, and altogether held for nothing, and that a new trial be granted in this action, costs to abide the event thereof, as aforesaid.

And thereupon as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRINE,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Nov. 13th*, 1878.

116 I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] E. O. PERRINE, *Clerk.*

117 At a special term of the supreme court of the State of New York, held at the chambers thereof, in the county court house in the city of New York, this 15th day of November, 1878.

Present: Hon. Abraham R. Lawrence, justice.

WILLIAM M. WILSON and MARY C. C. PERRY
against
ANN MARIA DEEN.

This cause having been brought on upon the remittitur herein, sent down from the court of appeals, and now filed in this court, by which remittitur it appears that an appeal was taken by the defendant to the court of appeals from the judgment of the general term of this court, entered in the office of the clerk of the city and county of New York on the fifteenth day of March, 1877, and said court of appeals having reversed the said judgment of this court and granted a new trial of this action, with costs, to abide the event, now, on motion of James K. Hill, attorney for said defendant, it is ordered and adjudged that said judgment or order of the court of appeals be, and the same hereby is, made the judgment of this court, and that a new trial of this action be granted, with costs, to abide the event of this action, and that this order or judgment be an-

118 nexed to the judgment record herein.

A copy.

HENRY A. GUMBLETON, *Clerk.*

(Endorsed:) Supreme court. William M. Wilson [and] Mary C. C. Perry ag'st Ann Maria Deen. Certified copy. Order on filing remittitur. James K. Hill, def't's att'y, 37 & 39 Wall St. I admit service November, 1878. Served by H. W. Borland Nov. 16, 1878.

To John Chetwood, Esq., pl'ffs' att'y, 74 Broadway, N. Y. city.

Sir: Please to take notice that the within is a copy of an order on filing remittitur filed November 15, 1878, in the office of the clerk of the city and county of New York.

JAMES K. HILL,
Def't's Att'y, 37 & 39 Wall St., N. Y. City.

119 Plaintiff's counsel then called as a witness Robert Macklin, who, being duly sworn, testified that in December, 1874, he was stenographer of the supreme court at special term and took the testimony in the case of William M. Wilson & Mary C. Perry against Ann Maria Deen on the trial before Judge Van Brunt; that the minutes of the testimony shown him were a correct transcript of what transpired in open court on December 2nd, 1874, and he reads from them as follows: "By consent, the action in the marine court, in which a verdict was rendered, is discontinued without costs to either party."

Plaintiff's counsel then read in evidence notices of appeal from the order denying a new trial and from the judgment in the marine court as follows:

120 Marine Court of the City of New York.

ANN MARIA DEEN, Pl'ff & App'l't,

vs.

WILLIAM M. WILSON, Def't & Resp'd't.

GENTLEMEN: Please take notice that above-named appellant hereby appeals to the general term of the marine court of the city of New York from the judgment entered in the above-entitled action in the office of the clerk of said court on the 12th day of March, 1874, in favor of said respondent and against said appellant for the sum of fifty-five dollars and thirty-one cents, costs, and from every part thereof.

Yours, &c., JAS. K. HILL,
Att'y [for] Pl'ff & App'l't.

Dated N. Y., March 13, 1874.

To John Chetwood, Esq., att'y [for] def't & resp'd't, & Maurice J. Powers, clerk of said court.

121 Marine Court of the City of New York.

ANN MARIA DEEN, Pl'ff, & App'l't,

vs.

WILLIAM M. WILSON, Def't & Resp'd't.

GENTLEMEN: Please take notice that the above-named appellant hereby appeals to the general term of the marine court of the city of New York from the order entered in this action in the said clerk's office on the 12th day of February, 1874, denying said appellant's motion for a new trial on the minutes of the judge before whom the cause was tried and from every part thereof.

Y'rs, &c., JAS. K. HILL,
Att'y [for] Pl'ff & App'l't.

Dated New York, March 12, 1874.

To John Chetwood, Esq., att'y [for] def't & resp'd't; Maurice J. Power, clerk of said court.

Plaintiff's counsel called as a witness James K. Hill, who, being sworn, testified that he was a practising attorney and counselor in New York city over twenty years, and was defendant's attorney in the action brought by Wilson and Perry against Deen in the
122 supreme court, and tried the same for defendant.

Witness was asked what occurred at the trial in the supreme court about two actions brought by Deen against Wilson in the marine court.

Defendant's counsel objected to this testimony as immaterial.

The court overruled the objection; to which ruling defendant's counsel then and there excepted.

The witness then testified that on the opening of the case for plaintiff before Judge Van Brunt it appeared that there were two actions pending in the marine court, in one of which the defendant had obtained judgment. He inquired what the issues were, and on production of the pleadings said in substance that the issues were substantially the same as in the action before him. After some discussion he said he would not proceed until the action in the marine court, in which there had been a verdict, was disposed of in some way. Mr. Chetwood offered to discontinue that action, provided No. 2 was discontinued, to which witness agreed, and the trial in the Supreme court was suspended that stipulations might be prepared. Witness "personally on the table in front of the bench drafted a stipulation in No. 1; also a stipulation in No. 2. The stipulation in No. 1 was that the judgment should be opened and the action discontinued without costs to either party as against the other." Witness said that he prepared the stipulations, and that they were executed there in court, and that he took one in each action and Mr. Chetwood took one in each action; that witness took his to his office and that is the last he recollects to have seen of either of them; that he has caused thorough search to be made in
123 his office; that they cannot be found, and he does not think they are in the office; that when the copy of the stenographer's minutes, ordered by him, was sent to the office, after the trial he found a memorandum by the stenographer of the discontinuance of that action; that it corresponds substantially with what transpired at the time, although according to witness' recollection in action No. 1 there was something more than a naked discontinuance.

Defendant's counsel objected to the last part of the answer as giving statements about contents of paper, and moves to strike out the words beginning with "was something," &c.

The court denied the motion; to which denial the defendant's counsel then and there duly excepted.

Defendants then produced, pursuant to notice, the following paper, which plaintiff read in evidence:

New York Marine Court.

ANN MARIA DEEN
vs.
WILLIAM M. WILSON. } No. 1.

It is hereby consented that the above action be discontinued without costs to either party as against the other, and that the judgment (entered herein be vacated and cancelled).

[The words in parentheses] written between lines after taking unusual space of other line for the words "and that the judgment."

Dated New York, Dec. 2nd, 1874.

JAS. K. HILL, plaintiff's attorney, [a] witness —, testified that the signature to said paper was his own; and, being asked, "The body is in your handwriting or one of your clerks?" said, Yes.

Q. Did you receive one exactly like that from Mr. Chetwood?

Defendant's counsel objected, the objection was overruled,
124 and defendant's counsel then and there duly excepted.

A. I received a stipulation precisely like that, except it was signed by the attorneys for the defendant in the action in the marine court, and except that in action No. 2 I suppose there was no judgment, and, as he recollects, there was nothing in the stipulation about a judgment. There couldn't have been very well, as witness took the stipulations to his office, but doesn't recollect any specific directions in regard to their entry.

On cross-examination he testified that since the commencement of this action he has a recollection that motion papers were prepared in his office and served in a motion in the marine court to have judgment in action No. 1 vacated, and that such motion was abandoned; that at the trial in the supreme court, before Judge Van Brunt, it was stated that the appeal in the action in the marine court, in which the judgment was entered, was still pending, and was so stated before the entry in the stenographer's minutes. Witness said he had recollected drawing the stipulation, and would have said that they were in his handwriting if it were not that it is in the handwriting of his clerk; in that he was mistaken—the papers were prepared then and there, and in the handwriting of witness' clerk, who was present. He doesn't infer that he was present because the papers are in the clerk's handwriting, but recollects it. His name was Bassett, and he is in the city of New York. Witness would have testified that the stipulations were in his own handwriting until it was produced.

Q. Up to what time would you have been willing to testify
125 that the stipulations were in your own handwriting?

A. I think until the time you *should* me his handwriting here to-day; that would have been my recollection.

Q. You testified on your direct examination that you prepared stipulations and made copies or duplicates and they were then and there signed?

A. Yes, sir.

Q. Is it not true that these stipulations were prepared at your office?

A. No, sir.

Q. And not in *at* the court-room?

A. No, sir; I have as distinct recollection of it as though it only occurred yesterday.

Q. And yet you had not a recollection that your clerk drew them?

A. I had not a recollection that they were in the handwriting of the clerk; the trial was suspended for that express purpose and resumed immediately afterwards.

Q. How came your clerk there present at the trial?

A. I rarely—perhaps never—try a cause without having some one from the office with me.

Q. Is it a mere inference of yours that he was there or have you a distinct recollection that he was present?

A. I have now that you show me his handwriting, which was the first thing that refreshed my recollection on that point; I have a distinct recollection that he was there.

Q. At the trial?

A. I do not know throughout the trial, because it extended through a number of days, but he was there on that day.

Q. Then you do not recollect whether he was there during the whole trial or not?

126 A. No, because it might have been another clerk from the office.

Q. Do you recollect any other clerk being present at the trial than Mr. Bassett?

A. Not distinctly; no.

Q. And until that paper was handed to you you had no recollection that Mr. Bassett was there?

A. I do not know; I would not like to say that.

Q. I understood you to say until a short time ago you thought the stipulations were in your own handwriting?

A. Yes, sir; but I did not say I did not think I had any clerk there.

Q. Until consent in action No. 1 was handed you to-day, had you any recollection that any clerk was present at that trial?

A. If you had asked me I should have said a clerk was there, though I might not have specified Mr. Bassett, for the reason that I did not try any cause without having some one from the office.

Q. Would you have stated it from recollection?

A. Yes, sir; that some one was there; though I might not have specified the clerk.

Q. Do you mean to say you would have sworn from recollection that some one was there because it was your custom to have some one from your office?

A. The custom was so uniform that I think I should have said so from memory.

Q. That some one was present?

A. Yes, sir.

Q. Do I understand you to say you remember distinctly
127 of taking the stipulations, which were signed by the attorneys for the defendant in the marine court, to your office at the close of the trial before Judge Van Brunt?

A. I took, at the close of the day, papers to the office, including these stipulations.

Q. Do I understand you to say you have a distinct recollection of taking those consents to your office?

A. I recollect putting those consents with the other papers in the suit, and I think I can say I recollect taking the whole package to the office, although I cannot recollect now of packing them up and carrying them.

Q. Perhaps that was part of the duty of the clerk—to take the papers.

A. It is possible.

Q. Do you recollect whether you took the papers back to your office, or whether the clerk did?

A. My best recollection is that I took them myself.

Q. Have you any recollection on the subject?

A. A glimmering, I think.

Q. Do you recollect what you did with them when you got to the office?

A. Not the slightest.

Q. At what point does your memory fail you?

A. I think I can recollect gathering up those papers and starting from the court-room with them; beyond that I do not recollect anything.

Q. Did any one assist you in the trial of the cause?

A. No one.

Q. If your clerk was present, why was he there; what were his duties there?

128 A. The main object of having a clerk was to see that the witnesses were in attendance, get any books that were required, and sometimes keep rough minutes.

Q. Have you ever looked for any minutes kept by you or your clerk on that trial?

A. I think at the settlement of the case, or the preparing of the amendments to the case, I had minutes of my own.

Q. Were there amendments proposed to the case?

A. That is my recollection.

Q. Were they settled before the judge?

A. That is my recollection.

Q. Have you any recollection of any refusal on that part of Mr. Chetwood to sign those consents, or either of them?

A. Not the slightest; it was not proposed.

Q. Which Mr. Chetwood tried the case before Judge Van Brunt?

A. Mr. Chetwood, Jr. (pointing to B. C. Chetwood).

Q. You have no recollection that either of them refused to sign these consents?

A. No, sir; I do not think that was the fact.

Q. In whose handwriting is the interlineation in this consent marked No. 1?

A. I do not feel confident about that.

Q. You testified that the paper itself was in the handwriting of your clerk?

A. Yes, sir; I did.

Q. Will you read the interlineation?

A. The only words that are interlined are "entered herein be vacated and cancelled."

Q. Has there not been more than that added after the con-
129 sent was completed or drawn?

A. There is, now that you call my attention to it, I think, a difference in the handwriting, commencing with the words "and the judgment herein be vacated and cancelled." I think a part of it resembles the handwriting of the rest of the stipulation very much.

Q. Will you read the stipulation down to the first period in it?

A. "It is hereby consented that the above action be discontinued without costs to either party as against the other."

Q. Is there not a period there?

A. Well, if punctuation of that character followed by a small "a" makes a period there is.

Q. Must not the entire balance of the consent have been added and formed a part of the addition or interlineation?

A. I think so.

Q. "And that the judgment entered herein be vacated and cancelled." It is evident that those words were added after the consent had been fully drawn, is it not?

A. I should say that it had been dated prior to those words being added.

Q. You cannot tell in whose handwriting those words are?

A. I do not feel positive about that.

Q. In your own?

A. No, sir.

Q. Is it not evident that they are not in the handwriting of the person who drew the consent in the first place?

A. The first four words, "and that the judgment," I think, are in the same handwriting.

130 Q. There would not have been any sense in stopping there, would there?

A. No, sir; not a particle that I can see.

Q. Can you not discover that the words "and that the judgment entered herein be vacated and cancelled" are in different ink from the rest of the consent?

A. I cannnot; that would not be my judgment.

Plaintiff then called G. A. C. VAN BUREN, who was sworn as a witness and testified that he was present at the trial of the action before Judge Van Brunt between Wilson and Perry *v.* Deen, in December, 1874, and was paying attention to the proceedings; that Mr. Hill raised an objection to the proceedings before Judge Van Brunt,

who inquired into the situation and decided that he could not go on unless the former case was vacated; that Mr. Chetwood rather demurred to vacating the proceedings already obtained, but Judge Van Brunt decided that he could not go on with the case, and then it was consented to. Mr. Chetwood agreed to give up the judgment he had obtained, and a stipulation was entered into that a discontinuance should be had of all former proceedings. Then Judge Van Brunt decided to go on; saw papers being drawn on the table, but did not see them after they were executed.

On cross-examination he testified that he was an acquaintance of Mrs. Deen, and did not know the other parties; that he attended from curiosity throughout the whole trial; had taken a good deal of interest in the litigation, and had enquired often of the clerk when the trial would come on.

131 Plaintiff then called BENJAMIN C. THAYER, who was sworn as a witness and testified that he was a practising attorney and counselor, and had been for many years; was present in court at the trial of Wilson and Perry against Deen, in supreme court, a part of the time. It was stated that two suits had been brought in the marine court and one had gone to judgment, and in consequence of this there was some hitch about going on before Judge Van Brunt; that his recollection was that it became necessary to get rid of the proceedings in the marine court; that it was stated there had been an action brought in the marine court for rent, and that action had been appealed, and it was said by some one that was a bar to the action on trial. The court suggested that he could not try the cause unless that judgment was out of the way, and the attorneys agreed that those actions should be got out of the way; did not see the papers signed, but they agreed to make such papers, or agreed to a discontinuance.

On cross-examination witness testified they agreed to discontinue both actions in the marine court; that he so understood it; cannot remember who stated that the actions in the marine court was a bar to the other one on trial.

Plaintiff's counsel here recalled the plaintiff in her own behalf, who further testified:

That she was present at the trial of the cause which had been referred to as having been tried before Judge Van Brunt; that she remembered that subject came up in regard to the trial going on because another suit was pending in the marine court; that
132 she could not remember which lawyer brought it up, but she remembered distinctly that Judge Van Brunt decided that the case could not be tried unless the case in the marine court was thrown out, and the whole thing must be vacated; that there was a judgment there pending, as well as some other action, and that the whole had to be thrown out of the marine court before the action could go on in the court before Judge Van Brunt, and it was then agreed upon by the lawyers that it should be so done; that the papers were prepared, but that she did not see the papers, and did not read

them; that it was understood that the papers were drawn up to that effect; that Judge Van Brunt would not go on until it was all settled, and so stated.

Upon cross-examination she testified as follows:

Q. I understand you to say that you did not put John Burns in possession of that house?

A. I did not; I never saw him and did not put him in possession of the house; I never saw him until Mrs. Perry and Mr. Wilson brought him there; it is not likely I would put a stranger in possession of the house when I had two servants, and one had been with me more than fifteen years and I had perfect confidence in.

Q. You did not think Mrs. Perry did?

A. Mrs. Perry had him with her previous, and he told me he belonged to her, and she expected to keep him and retain him as a waiter.

Q. Do you suppose he staid there after that?

A. I don't suppose anything about it, only what I know myself; I don't form any suppositions or make any.

Q. How long did you see John Burns there?

133 A. From Wednesday, the day they took possession, more or less, until Saturday, when I gave up full possession.

Q. Then, John Burns was there during that period?

A. I saw him at different times bringing in things for different persons.

Q. And acting for Mrs. Perry?

A. For Mrs. Perry and Mr. Wilson.

Q. You are sure he was not acting for you at all?

A. He was not acting for me at all; I never called upon him to do one thing.

Q. Do you understand it was the same John Burns there when you took possession of the house in April, 1874?

A. It was the same man.

The plaintiff thereupon rested, and the court adjourned to the following week on Tuesday.

The defendant's counsel moved to dismiss the complaint on the ground that there is nothing to impair the integrity of this judgment, which is a bar.

The court denied the motion; to which ruling the defendant then and there duly excepted.

BRADBURY C. CHETWOOD was thereupon called as a witness on behalf of defendant, and testified as follows:

Was and is an attorney-at-law, and tried for the defendant the action of Deen against Wilson in the marine court, in which judgment was entered; and also the action of Wilson and Perry against Deen before Judge Van Brunt in supreme court for plaintiff; opened this last trial at length and referred to the marine court action, in which judgment had been entered, and to the pending

134 appeal, after which the court said it would not allow the trial to go on while proceedings were going on in this other court.

After some discussion between the judge and himself Mr. Hill whispered a suggestion to him that they might suspend or discontinue the appeal or proceedings there and go on in the supreme court, and to this witness agreed. Not a word was said in that discussion at that time about vacating the judgment in the marine court, or anything to that effect, that witness remembered. He was sure there was not.

The question was whether witness would consent to discontinue the proceedings then going on in the marine court. The result was they went on in supreme court. At that time witness gave an oral consent to suspend or discontiue proceedings in the other court; was positive that nothing was said about vacating the judgment; familiar with the pleadings in the action in the supreme court, and knew that the complaint set up the marine court judgment as a reason why the supreme court action should be sustained. At no time before Judge Van Brunt did witness consent to vacate the judgment, and this for two reasons: One, that witness was not asked to do it; another, that it was very important to the pending supreme court action. Witness had no recollection of signing any written stipulation or consent at that time before Judge Van Brunt either to vacate the marine court judgment or to discontinue any proceedings in that action. The trial was not suspended to allow preparation of written stipulation. Subsequently a written stipulation was submitted to him, which he had seen in court that day and which he referred to Mr. John Chetwood, the attorney for Wilson and Perry, in whose employment he was at that time, and who refused to sign it.

135 On cross-examination witness testified:

The stipulations proposed were handed to him first from Mr. Hill's office some time after the trial. Witness never signed any stipulations that he recollects, and certainly never signed any agreement to vacate any judgment; was never asked to do it, except or unless it is called asking to have sent the stipulation to him with the words inserted to vacate the judgment rendered.

Heard of a motion years afterwards to vacate the judgment in the marine court. The trial before Judge Van Brunt was in the winter of 1874. The two stipulations were handed to him years ago, about a week after the trial; has seen them in court since the trial here began; shown him by Mr. John Chetwood among the papers; is not now with him; never received or heard of any costs on discontinuance of the marine court actions being collected. Judge Van Brunt did not, to his knowledge, ask what we were doing in a court of equity when we had our remedy at law. The judge did not say that he would not go on with the case while two suits at law were pending. He asked how the action stood in which judgment was rendered. Witness told him it was on appeal. He said while that was pending he would not go on; we would have to get rid of that appeal, or something to that effect—to stay or discontinue the appeal—and witness did agree to discontinue, and the trial proceeded.

On redirect examination witness testified that he argued the case

on appeal from Judge Van Brunt to the general term, and that one of the points submitted on that argument was that "the defendant brought an action in the marine court for the second month's
136 rent against the plaintiff, Wilson, which action was tried before Judge Alker and a jury, who found a verdict for the defendant there, one of the present plaintiffs." And next: "It will be seen that the issue of fraud was distinctly passed upon in this trial in the marine court in favor of this plaintiff. It was also passed upon in the same manner, but less directly, on this trial."

Defendant called HENRY M. WALKER as a witness, who, being sworn, testified that he was an attorney-at-law and knew the parties to the action; was a witness in the marine court trial, and was present at the trial before Judge Van Brunt. The judge seemed to object to the trial going on, because the marine court suit was then pending, and that the then pending proceedings in the marine court should be discontinued. Not a word was said about the judgment which had been recovered in the marine court. Mr. Chetwood stated that an appeal was pending in the marine court, and then Judge Van Brunt said in effect that he wouldn't allow the trial to go on till the appeal proceeding in the marine court was discontinued. Witness did not remember any suspension of the trial to enable counsel to prepare any written stipulations or consents.

On cross-examination witness testified that Judge Van Brunt's decision was either that they should finish up the suit in the marine court or that the pending proceedings in the marine court should be discontinued; knows that Mr. Hill spoke to Mr. Chetwood right in the middle of his argument.

137 JOHN CHETWOOD, called as a witness for defendant, testified that he was an attorney-at-law and the attorney of record of defendant in this action and in the various actions in the marine and supreme courts; was not present at the trials; first saw the stipulations produced in evidence here, and signed by Mr. Hill some time after the trial in the supreme court; does not distinctly recollect who presented it to him, but his impression is his brother, and he presumes at his own office; it was submitted to him as a stipulation that had been proposed from the other side; he looked at it carefully, and peremptorily refused to sign or have signed any such paper. B. C. Chetwood, his brother, who tried the actions, was employed in witness's office at a salary, and was sent to try the actions; he never was a partner or interested in the business of the office.

HENRY M. WALKER was recalled, and testified that he was present throughout Mr. Chetwood's opening in the supreme court, and sat by his side, and there was no suspension of trial to enable counsel to prepare written stipulations.

After which the trial proceeded.

138 The counsel for the defendant asked the court to hold and decide that the judgment recovered in the marine court, which had been given in evidence, was a bar to the recovery of the plaintiff in this action.

The court refused so to hold and decide, but did hold and decide

that the judgment was not a bar except as to the recovery of the $450, being the first month's rent, with interest from December 1st, 1874, and that said judgment never having been vacated, and being an existing and unvacated judgment of the marine court, was a bar to the recovery of so much of plaintiff's demand as related to said month's rent; to which decision and ruling the counsel for defendant then and there duly excepted.

The counsel for the defendant then asked the court to hold and decide that the possession of the house in question that Mrs. Deen took in April, 1874, dispossessed Mrs. Perry, and that Mrs.
139 Perry, if accountable, was not accountable for the rent after such possession was taken.

The court refused so to hold and decide; whereupon counsel for defendant then and there duly excepted.

The counsel for the defendant requested the court to submit the question to the jury whether or not the possession then taken by Mrs. Deen did not in and of itself dispossess Mrs. Perry.

The court refused to submit such question to the jury; whereupon counsel for the defendant then and there duly excepted.

The counsel for the defendant further requested the court to submit to the jury the question whether or not John Burns was in possession of the house in question under Mrs. Perry after the execution of the lease and up to the time plaintiff entered into possession, as claimed by her, in April, 1874.

The court refused to submit such question to the jury
140 and counsel for defendant then and there duly excepted.

The counsel for the defendant then asked the court to hold and decide that the possession of the premises in question, as taken by Mrs. Deen in April, 1874, was an ouster or eviction of Mrs. Perry, and that Mrs. Deen could not recover for rent accruing or becoming due under the lease after such ouster or eviction took place.

The court refused so to hold and decide, and the defendant's counsel then and there duly excepted.

The counsel for the defendant further asked the court to submit to the jury the question whether or not the possession of the premises taken by Mrs. Deen in April, 1874, was not an ouster or eviction of Mrs. Perry.

The court refused to submit such question to the jury; whereupon counsel for the defendant then and there duly excepted.

The defendant's counsel also asked the court to charge the
141 jury that, inasmuch as Mrs. Deen took possession of the house and furniture in question and rented the house without the furniture afterwards, the amount that she thus received for such house alone is not the amount to be deducted or allowed to Mr. Wilson in determining the verdict. On the contrary, Mr. Wilson is entitled to be allowed in this action as a counter-claim whatever sum the said house, together with the furniture, would have rented for.

The court refused so to charge, and defendant's counsel then and there duly excepted.

The counsel for the defendant further requested the court to charge

that it was the duty of Mrs. Deen to rent the house and furniture as a whole, in order that the amount to be credited to Mr. Wilson be properly determined.

The court refused so to charge, and the counsel for the defendant then and there duly excepted.

142 The counsel for defendant further requested the court to hold and determine that it was incumbent upon Mrs. Deen to prove what the rental value of the furniture was in the house aside from the rental of the house itself in order that the jury might determine the amount which she would be entitled to recover in the action.

The court refused so to hold and determine, and the counsel for defendant then and there duly excepted.

The counsel for defendant also asked the court to submit the question to the jury under the evidence to determine what would be the proper amount to be credited to Mr. Wilson as rental for the property.

The court refused to submit such question to the jury upon the ground that there was no evidence in the case upon this point, and defendant's counsel then and there duly excepted.

143 The court having held that, as matter of law, the marine court judgment was an existing and unvacated judgment, and that therefore the amount of the first month's rent should be deducted from the plaintiff's claim, and there being no further question of fact in the case for the jury to pass upon, directed the jury to find and the jury found a verdict under said direction for plaintiff in the sum of $12,026.89.

To which direction of the court the defendant's counsel then and there duly excepted.

And inasmuch as the said several matters do not appear by the record the defendant's counsel requested the judge of said court to allow and sign this bill of exceptions, and the said judge did, in pursuance of said request and of the statutes in such case provided, so allow and sign this bill of exceptions, containing in substance the whole of the testimony and evidence in said cause at and during the term of this court aforesaid, to wit, at the April term of
144 said court, A. D. 1883.

(Signed) N. SHIPMAN, [L. S.]
Judge.

Endorsed: U. S. circuit court, south'n district N. Y. Ann Maria Deen, plaintiff, against William M. Wilson, defendant. Bill of exceptions. John Chetwood, def't's att'y, 145 Br'dway, N. Y. U. S. circuit court. Filed Sep. 87, 1883. Timothy Griffith, clerk. Filed *nunc pro, tunc* as of May 16, 1883, pursuant to order on file. (S'g'd) T. G., cl'k, by T.

145 U. S. Circuit Court, Southern District of New York.

ANN MARIA DEEN *vs.* WILLIAM M. WILSON.

It is hereby ordered that the bill of exceptions as allowed and signed by me be filed *nunc pro tunc* as of the 16th day of May, A. D. 1883.

Dated Sept. 28th, 1883.

(S'g'd) N. SHIPMAN, *Judge.*

(Endorsed:) U. S. circuit court, south'n dist. N. Y. Ann Maria Deen *vs.* Wm. M. Wilson. Order that bill of exceptions be filed *nunc pro tunc.* John Chetwood, att'y [for] def't.

(Further endorsed:) U. S. circuit court. Filed Oct. 1, 1883. Timothy Griffith, clerk.

Bond for Damages and Costs.

146 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

ANN MARIA DEEN, Plaintiff,

vs.

WILLIAM M. WILSON, Defendant.

Know all men by these presents that we, William M. Wilson, of 7 St. Luke's Place, New York city, and Charles T. Hunter, of 348 West 14th street, in said city, are held and firmly bound unto the above-named Ann Maria Deen in the sum of twenty-five thousand dollars, to be paid to the said Ann Maria Deen; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the first day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas the above-named William M. Wilson has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York, in the second circuit:

Now, therefore, the condition of this obligation is such that if the above-named William M. Wilson shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. M. WILSON. [L. S.]
CHARLES T. HUNTER. [L. S.]

Sealed and delivered and taken and acknowledged this first day of October, 1883, before me—

(S'g'd) ADAM GOS,
Notary Public, N. Y. Co.

147 [Endorsed:] U. S. circuit court. Ann Maria Deen *vs.* William M. Wilson. Bond for damages and costs on writ of error. John Chetwood, att'y [for] def't, 145 Broadway, N. Y. city. U. S. circuit court. Filed Oct. 6, 1883. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Charles T. Hunter, being duly sworn, does depose and says that he is the surety named in and who executed the foregoing bond; that he is worth the sum of one hundred thousand dollars over and above all his just debts and liabilities, and that he is a resident and freeholder within the southern district of New York.

(S'g'd) CHARLES T. HUNTER.

Sworn to this first day of October, A. D. 1883, before me—

[SEAL.] (S'g'd) ADAM GOS,
Notary Public N. Y. Co.

Approved and taken this October 4th, A. D. 1883, by—

(S'g'd) N. SHIPMAN, *Judge.*

148 The United States of America to Ann Maria Deen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the fourth Monday of October, A. D. eighteen hundred and eighty-three, pursuant to the writ of error filed in the office of the clerk of the circuit court of the United States for the southern district of New York, in the second circuit, wherein William M. Wilson is plaintiff in error and you, the said Ann Maria Deen, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fourth (4th) day of October, A. D. eighteen hundred and eighty-three.

N. SHIPMAN,
Acting as One of the Judges of the Circuit Court of the U. S. for the Southern District of New York.

149 SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this fifth day of October, A. D. 1883, before me personally appeared Adam Gos, to me personally known, who, being by me duly sworn, on his oath did depose and say that on the fifth day of October, A. D. 1883, he served the within citation on Messrs. Jas. K. Hill, Wing and Shoudy, the attorneys of record for Ann Maria Deen, the within-named defendant in error, by delivering to and leaving with James K. Hill, Esquire (to deponent known to be a member of the said firm of Jas. K. Hill, Wing and Shoudy), personally a

true copy of the said citation, and exhibiting to him the within original at their office in No. 45 William street, New York city.

ADAM GOS.

Subscribed and sworn to before me this 6th day of October, A. D. 1883.

[Seal Henry I. Thornton, Notary Public, New York County.]

HENRY I. THORNTON,
Notary Public (*No.* 69), *City and County of New York.*

[Endorsed:] U. S. Supreme Court. William M. Wilson, plaintiff in error, *vs.* Ann Maria Deen, defendant in error. Citation. John Chetwood, att'y [for] pl't'ff in error, 145 Broadway, N. Y. city. [Stamped:] U. S. circuit court. Filed Oct. 6, 1883. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 189. William Milne, executor of William M. Wilson, deceased, plaintiff in error, *vs.* Ann Maria Deen. Filed 23rd October, 1883.

121-525

OCTOBER TERM, 1886.—No. 189.

SUPREME COURT OF THE UNITED STATES,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

WILLIAM MILNE, AS EXECUTOR, &c., OF WILLIAM M. WILSON, DECEASED, PLAINTIFF IN ERROR,

vs.

ANN MARIA DEEN.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN CLINTON GRAY,
EDWARD C. PERKINS,
Of Counsel.

IN THE

Supreme Court

OF THE UNITED STATES.

WILLIAM MILNE, as Executor of the last Will and Testament of WILLIAM M. WILSON, deceased,
Plaintiff in Error,

vs.

ANN MARIA DEEN,
Defendant in Error.

In error to the Circuit Court of the United States for the Southern District of New York.

Brief for Plaintiff in Error.

STATEMENT.

The action below was brought by Ann Maria Deen, the defendant in error, against William M. Wilson, the testator of the plaintiff in error, to recover against him as surety, a sum alleged to be due by way of rent on a lease made by the said Ann Maria Deen to one Mary C. C. Perry, of the house No. 4 East Thirtieth street, in New York City.

The complaint alleged the making of a lease of the

house, with the furniture therein, for two years and ten months from the first day of December, 1873 at the rent of four hundred and fifty dollars a month, payable in advance, with a clause of re-entry in case of default in the payment of rent, or in any of the covenants in the lease (*Record, original page 13*). It also alleged the execution by the testator of the plaintiff in error of an instrument under seal, whereby he guaranteed the payment of the rent and the performance of the covenants contained in the lease on the part of the lessee (*p. 15*). It alleged that no rent had been paid, except that for the first month (*p. 7*); that at some time in or after the month of December, 1873, the said Perry ceased to occupy the premises as a dwelling-house, and abandoned the same (*p. 8*); that the house and furniture were greatly damaged by such abandonment, and that afterwards, and on or about the first day of December, 1874, the plaintiff, after notice to the said Perry, and for the purpose of protecting the property and preventing further injury, proceeded to rent the said premises on account of the said Perry for the sum of three hundred dollars per month, for the remainder of the term, that being the highest obtainable rent (*p. 9*). That there was due for rent on the said lease up to December 1st, 1874, the sum of five thousand four hundred dollars, and interest, and for rent after December 1st, 1874, after crediting the defendant with the amount collected from the new tenant, a balance of three thousand one hundred and fifty dollars. Judgment was demanded for the aggregate of these sums (*p. 10*).

The answer (*p. 17*), among other things, contained denials of the allegations as to the abandonment of the premises by Mrs. Perry, and the notice to her of the intention of the defendant in error to resume possession, and of the allegation as to the amount due (*p. 23*), and, for a separate defense, alleged (*p. 22*) that in Decem-

ber, 1873, the plaintiff brought an action in the Marine Court of the city of New York against the defendant, for the rent of the same premises for the month of December, 1873, and that the defendant "recovered judg- "ment against the plaintiff therein, duly given upon "the merits thereof in said action, and for the costs of "the said action."

Upon the trial, the plaintiff below, after putting in evidence the lease and guaranty aforesaid (*p. 32*), proved the service upon Mrs. Perry (*but not upon Mr. Wilson*), on March 27th, 1874, of a letter dated on that day in the following terms (*pp. 31, 57*):

"*Dear sir:*

"As Mrs. Perry appears to have abandoned the "house No. 4 East 30th street to the man John, and I "am informed that there is great danger of the furni- "ture being injured, removed and lost, I shall, in order "to protect the property, take possession of the prem- "ises on the 1st day of April next and rent them for "the remainder of the term on her account, and look "to her and you for any deficiency in rent and ex- "penses of reletting, as well as for all damages that I "may have sustained by reason of the loss of or injury "to the furniture up to that date. If you have any ob- "jection to my taking possession of the premises, be "kind enough to inform me by letter, addressed to the "care of James K. Hill, 62 Wall street, New York "City.

"Yours, etc.,
(Signed) "A. M. DEEN."

Plaintiff then proved that she signed the foregoing letter, and caused it to be served, in consequence of information which she had received as to the manner in which the house was being occupied (*p. 36*); that she

afterwards took possession of the premises on April 29th, 1874 (*p. 37*); that she found there a man named John Burns who was with Mrs. Perry when she took possession of the house, and had assisted Mrs. Perry in bringing her things in, and who was never employed by Mrs. Deen in any way (*pp. 37, 45*); that she made every effort to let the premises and succeeded in renting them on the first of December, 1874, to a Mr. Sherman.

The lease to Mr. Sherman was given in evidence (*p. 39*). It is a lease by the defendant in error, dated November 27th, 1874, of the premises in question, without furniture, except mirrors and gas fixtures, for two years and five months, from the first of December, 1874, at thirty-six hundred dollars a year, payable in half-yearly payments in advance; otherwise substantially the same as the lease from Deen to Perry.

Plaintiff further testified that she received no answer from Mrs. Perry or Mr. Wilson to her notice of March 27th, 1874 (*p. 46*).

Plaintiff below then called Samuel D. Burchard, who testified, under objection, that in March, 1874, he was passing by the premises in question in the evening; that the door was open and there were three or four females on the stoop and on the steps who invited him to "walk in and have a good time;" that the language addressed to him was improper and such as would not have been used by ladies, and that he communicated the fact to Mrs. Deen (*p. 55*).

The plaintiff, after proving the balance due to her to be $12,732.27, then rested (*p. 58*).

The defendant having first offered certain evidence not material to our assignments of error, put in evidence the entry in the Judgment Book of the Marine Court of the judgment in the aforesaid action, and also the judgment roll therein containing the summons and

complaint, the answer, minutes of verdict for the defendant and judgment in favor of the defendant for costs (*pp. 68, 77*).

The complaint is upon the same lease as that upon which this action is brought, and is for rent for the month beginning on the first day of December, 1873.

The answer sets up that "On or about the 29th day "of October, 1873, the plaintiff, by false and fraudu- "lent statements, obtained the signature of Mary C. C. "Perry, and of this defendant, to a paper purporting "to be a lease of the premises described in the com- "plaint; that the said Marry C. C. Perry and this de- "fendant were both misled by the said false represen- "tations, and that said Mary C. C. Perry and this de- "fendant were induced by their belief in the truth "of such representations to sign the said paper."

It was then admitted of record by counsel for the plaintiff below, that "the only issue tried in that action," in the Marine Court, "was that of fraud in procuring the "lease; that there was no issue as to the payment of the "rent, or as to the delivery of the lease" (*p. 77*). The defendant then rested.

The plaintiff's counsel also offered in evidence a notice of appeal from the judgment in favor of the defendant in the suit of Deen against Wilson, in the Marine Court, dated March 13th, 1874 (*p. 120*).

The testimony being closed, counsel for defendant below moved to dismiss the complaint, on the ground that the judgment in the Marine Court was a bar to this action. The motion was denied under exception by the defendant (*p. 133*).

The Court, after refusing to make certain rulings requested by counsel for the defendant below, and to subsubmit certain questions to the jury as requested by the defendant, which refusals are more fully set forth in our assignments of error, directed a verdict in favor

of the plaintiff for $12,026.89, being the full amount claimed, less the amount of the rent for the month of December, 1883, to which direction defendant duly excepted (*p. 143*).

Thereafter the defendant below duly procured the settlement of this bill of exceptions, and sued out the present writ of error to this Court.

The original plaintiff in error, William M. Wilson, died in April, 1884, and the present plaintiff in error, having been appointed his executor, voluntarily came in, and was admitted a party to this suit in his place.

ASSIGNMENT OF ERRORS.

First.—The Court below erred in granting the motion of counsel for plaintiff below, "that the Court direct "the jury to find a verdict for the plaintiff for the sum "of $12,026.89."

Second.—The Court below erred in denying the motion of counsel for defendant below, that "The jury "be directed to find a verdict for the defendant."

Third.—The Court below erred in refusing the request of counsel for the defendant, "to hold and decide that "the judgment recovered in the Marine Court, which "had been given in evidence, was a bar to the recovery "of the plaintiff in this action," and in holding and deciding contrary to the said request, "that the judg- "ment was not a bar except as to the recovery of the "$450, being the first month's rent, with interest from "December 1st, 1874."

Fourth.—The Court below errred in refusing the request of counsel for defendant, that it hold and decide

"that the possession of the house in question that Mrs. "Deen took in April, 1874, dispossessed Mrs. Perry, "and that Mrs. Perry, if accountable, was not account- "able for the rent after such possession was taken."

Fifth.—The Court below erred in refusing the request of counsel for the defendant, "that it submit the ques- "tion to the jury, whether or not the possession then "taken by Mrs. Deen did not in and of itself dispossess "Mrs. Perry."

Sixth.—The Court below erred in refusing the request of counsel for the defendant, that it "submit to the "jury the question, whether or not John Burns was in "possession of the house in question under Mrs. Perry "after the execution of the lease, and up to the time "plaintiff entered into possession as claimed by her in "April, 1874."

Seventh.—The Court below erred in refusing the request of counsel for the defendant, that it "hold and "decide that the possession of the premises in question "as taken by Mrs. Deen, in April, 1874, was an ouster "or eviction of Mrs. Perry, and that Mrs. Deen could "not recover for rent accruing or becoming due under "the lease after such ouster or eviction took place."

Eighth.—The Court below erred in refusing the request of counsel for the defendant, that it "submit to "the jury the question, whether or not the possession "of the premises taken by Mrs. Deen, in April, 1874, "was not an ouster or eviction of Mrs. Perry."

POINTS.

First.

THE PLAINTIFF IN ERROR ESTABLISHED A COMPLETE DEFENSE TO THE ACTION IN THE CIRCUIT COURT, BY PROVING THAT HE HAD RECOVERED JUDGMENT IN THE MARINE COURT ON AN ISSUE AS TO THE VALIDITY OF THE LEASE.

It appeared on the trial below, from the judgment roll of the action in the Marine Court (*original pages 67 and 68 of Record*), that the action was between the same parties, was brought to recover rent under the same lease for the month of December, 1873 (a part of the very demand in this action), and that the only defence, besides a general denial, was that the plaintiff, "*by false and fraudulent representations*," induced the defendant, and Mrs. Perry, the lessee, to sign the lease; that they were "both misled by the said false representations," and "were induced by their belief in the truth of such representations to sign the said paper" (*p. 71*).

It was admitted on the trial (*p. 77*) that "the only "issue tried in that action was that of fraud in pro- "curing the lease."

This proof brought the defendant's case even within the narrow limits of such a rule as would restrict the effect of a judgment, in a subsequent action on a different demand, to matters actually litigated and determined in the former suit.

Cromwell vs. *County of Sac*, 94 U. S., 351.

And the case at bar cannot be distinguished from

Lumber Co. vs. *Buchtel*, 101 U. S., 638.
Beloit vs. *Morgan*, 7 Wall, 621.
Gardner vs. *Buckbee*, 3 Cow. (N. Y.) 120.
Bouchaud vs. *Diaz*, 3 Den. (N. Y.), 243.

We doubt if mere conjecture could lead this Court to form a plausible theory of the method by which the learned Judge below, having held (*p. 143*) that "the "judgment in the Marine Court was an existing and un- "vacated judgment; and that it barred the plaintiff "from any recovery for rent for December, 1873," escaped the conclusion that it also barred her from recovering the remainder of her demand.

As a matter of fact, we understand his opinion to have gone upon the ground that in so far as the suit below was upon a different demand under the lease from that upon which the judgment was recovered, that judgment was not a bar, but only established the truth of the evidence upon which the judgment rested; that it was not proof of fraud, but only of the facts there held to have amounted to fraud.

Having learned that in another suit in the State Supreme Court, between these same parties, the Court of Appeals had reversed a judgment declaring the lease in question to be void for fraud, and had ordered a new trial, on the ground that the facts there found were not of a character to avoid the lease for fraud, the learned Judge assumed (for there was no evidence, as the record shows, on the point) that the verdict in the Marine Court was upon the same evidence as that offered in the Supreme Court; and he held that the judgment on that verdict, being merely proof of facts insufficient to avoid the lease, was itself unavailing to avoid it.

1. This assumption as to the facts was absolutely unfounded. There was no evidence as to the facts found

in the Marine Court, except the admission of counsel that the only issue tried there was whether the lease was procured by fraud.

2. But no support can be found for the proposition that where the new suit is on a new demand the prior judgment only settles the facts litigated, and leaves open to attack the legal conclusions from those facts on which the judgment rested.

The Courts have made no distinction, in applying the rule of *res adjudicata*, between a suit on the same and one on a new demand, as to matters actually litigated and determined in the prior suit.

The whole subject was considered at great length in *Cromwell* vs. *County of Sac*, *ubi supra*, and as the result of that discussion it appears that the only difference made between those two classes of cases, is where, in the new suit, it is sought to preclude a party as to matters which *might have been, but were not*, litigated in the prior suit. Neither that exception, nor the reasons given for it, can be applied to this case.

"The general rule applicable here, is that the judg-
"ment of a Court of concurrent jurisdiction, directly
"upon the point, is as a plea, a bar, or as evidence, con-
"clusive, between the same parties, upon the same
"matter, directly in question in another Court:

Per DE GREY, C. J., in *Duchess of Kingston's Case*, 20 How. St. Pr., 538.

"When a particular *controversy*" has been tried and determined, and resulted in a final judgment, "it "will be considered as having *settled that matter* as to "all future actions between the parties."

Per NELSON, J., in *Packet Co.* vs. *Sickles*, 5 Wall., 572.

"The judgment of a Court of competent jurisdiction

" upon a question directly at issue between parties, un-
" less reversed, forever concludes and estops all parties
" to the action and those in privity with them, from
" questioning its *accuracy or justice* in another ac-
" tion."

Per WESTBROOK, J., in *People* vs. *Stephens*, 51 How. Pr., 235.

" Whether it was rightly or wrongly decided, is a
" question that cannot be raised in this action—even if
" the decision was wrong, it does not impair the effect
" of the former judgment as a bar to the right to raise
" the same question."

Per MILLER, J., in *Griffin* vs. *Long Island City*, 102 N. Y., 449.

And we are not left simply to the natural inference to be drawn from such comprehensive language as this, for the rule has repeatedly been applied where the question determined in the former suit, and sought to be raised again in the new suit, was purely a question of law.

Tioga R. R. Co. vs. *Blossburg, &c., R. R. Co.*, 20 Wall., 137.
Pray vs. *Hegeman*, 98 N. Y., 351.
Lorillard vs. *Clyde*, 99 N. Y., 196, 201.
Collier vs. *Walters*, L. R., 17 Q. B. D., 252, 266.

It applies where the judgment set up as a bar was rendered on demurrer.

Goodrich vs. *The City of Chicago*, 5 Wall., 566.
People vs. *Stephens*, 51 How. Pr., 235, aff'd., 71 N. Y., 527.
Bouchaud vs. *Diaz, ubi supra.*

And where the judgment was rendered on a special verdict.

Birckhead vs. *Brown*, 5 Sandf. Ch., 141.

Second.

THE RE-TAKING OF POSSESSION OF THE DEMISED PREMISES BY THE DEFENDANT IN ERROR WAS EITHER AN EVICTION OF THE TENANT OR AN ENFORCEMENT OF THE LANDLORD'S RIGHT OF RE-ENTRY FOR BREACH OF THE CONDITION TO PAY RENT, AND THE RENT FOR THE REMAINDER OF THE TERM WAS EITHER SUSPENDED BY THE EVICTION OR EXTINGUISHED BY THE RE-ENTRY.

I.

A. The defendant in error claims that she was entitled to enter, without terminating the lease, because her tenant had abandoned the premises.

But even if the tenant had abandoned the premises, this would give the landlord no right to re-enter or to take possession.

Day vs. *Watson*, 8 Mich., 535.
Rice vs. *Dudley*, 65 Ala., 68.

There was, however, a complete failure to show any abandonment by Mrs. Perry ; the result of the attempt to prove it, was to show by the unimpeachable testimony of Mrs. Deen herself, that when she took possession she found the tenant's own servant in occupation (*pp. 37 and 45*).

The evidence of the Rev. Mr. Burchard did not show

or tend to show that there was an abandonment; the persons whom he saw may have been there by license or permission of the tenant and their character is not material to the question. But if the tendency of this testimony was otherwise, it was overcome by proof that the servant John was in possession when defendant in error re-entered.

B. Defendant in error claims that she was authorized to re-enter, and still treat the lease as subsisting, because, on March 27th, 1874, she wrote a letter *to Mr. Wilson* (which was served on Mrs. Perry, but not on him), stating that she intended, as Mrs. Perry had abandoned the premises, to re enter and re-let them on Mrs. Perry's account; to which letter she received no answer (p. 57).

1. The letter was not to Mrs. Perry; it begins "Dear sir," and its first words are "As Mrs. Perry seems to "have abandoned possession;" therefore no assent or estoppel can be worked out from Mrs. Perry's silence.

2. The letter does not ask for Mrs. Perry's assent or dissent. It states that Mrs. Perry "has abandoned "the premises to the man John" and assumes the right to take possession and re-let the premises for account of the lessee and her surety. It is not a proposal, but an assertion of right. If, as we have already argued, the assumed right did not exist, Mrs. Perry's mere silence was not sufficient to confer it.

3. Even if the letter can be treated as a proposal to Mrs. Perry, it was a proposal to vary the legal situation of the parties under the contract. Mrs. Perry was under no obligation to answer such a proposition one way or the other, and therefore, she was not estopped or concluded by her silence. It stopped short of being an agreement as the assent of the other party is wanting.

II.

Unless, then, the re-entry was for condition broken, it was justified by no right of the landlord, and by no agreement with the tenant; and therefore it amounted to an eviction.

If the re-entry was for condition broken, it worked a forfeiture and terminated all rights under the lease.

Hall vs. *Gould*, 13 N. Y., 137.

If there was an eviction the rent was suspended while the tenant remained out of possession.

Coleman vs. *Morrill*, 117 Mass., 262.
Christopher vs. *Austin*, 11 N. Y., 216.
Stuyvesant vs. *Davis*, 9 Pai., 428.
Jones vs. *Carter*, 15 M. & W., 718.
Day vs. *Watson*, *ubi supra*.
Rice vs. *Dudley*, *ubi supra*.
Taylor's L. & T., § 377.

And the result in either case would be the same, for the tenant never resumed possession.

Third.

IF THERE WAS NOT AN EVICTION OR FORFEITURE, AS WE HAVE ARGUED, IT MUST BE BECAUSE SOME AGREEMENT BETWEEN DEFENDANT IN ERROR AND MRS. PERRY RESULTED FROM THE FACTS PROVED RELATING TO THE LETTER OF MARCH 27TH. IF IT IS CONSIDERED THAT SUCH AN AGREEMENT WAS PROVED, THEN IT RESULTS THAT THE TESTATOR OF THE PLAINTIFF IN ERROR, AS SURETY, WAS THEREBY AT ONCE DISCHARGED.

This would be true because another agreement than

the one on which the testator became surety would have been made, which varied the previous agreement, and which extended the time of payment of the rent.

We, therefore, can invoke the familiar rule of law, that any variation whatever of the agreement, to which the surety has not assented, will discharge him.

I.

One of the terms of the supposed agreement would have been, that Mrs. Perry, instead of being liable for the full monthly rent, should only be liable for any deficiency upon a re-letting. But, so long as the premises remained unoccupied, it could not have been ascertained until the end of each month what the deficiency for that month would be, or whether there would be any, for it would have been the duty of the defendant in error to rent them at any time during the month when she could find a tenant. The defendant in error, therefore, could not have sued Mrs. Perry for any month's rent, until that month was over; *but under the lease in suit the rent was payable in advance.* The effect of such an agreement, therefore, would have been to vary the original agreement, and to give time to the principal debtor, and therefore to release the surety.

Combe vs. *Woolf*, 1 M. & Scott, 247.
Orme vs. *Young*, Holt N. P. C., 84.
Liquidators, &c. vs. *Liquidators, &c.*, L. R., 7 H. L., 348, 361.
Horne vs. *Bodwell*, 5 Gray, 457.
Greely vs. *Dow*. 2 Metc., 176.
Rees vs. *Berrington*, 2 Ver. Jr., 540.
Samuel vs. *Howarth*, 3 Meriv., 273.
Gahn vs. *Niemcewicz*, 11 Wend., 317.

II.

The supposed agreement, and the landlord's re-entry thereunder, would constitute a surrender by operation of law; the obligation to pay rent would cease, and there would only remain an obligation of the tenant, *arising out of the new agreement*, to pay an unliquidated sum, for the payment of which the surety never bound himself.

Possession of the premises by the landlord is inconsistent with the continuance of the lease, and still more inconsistent is it, that the landlord should relet to another tenant. He "cannot at the same time have two "original tenants holding under distinct, independent "leases" (per HARRIS, P. J., in *Smith* vs. *Niven*, 2 Barb., 180). Re-entry, or re-letting to another tenant, by the consent or with the acquiescence of the tenant, constitutes a surrender by operation of law.

Amory vs. *Kannofsky*, 117 Mass., 351.
Hanham vs. *Sherman*, 114 Mass., 19, 23.
Talbot vs. *Whipple*, 127 *Id.*, 242, 248.
Davison vs. *Gent*, 1 H. & N., 744.
Thomas vs. *Cook*, 2 B. & Ald., 119.
Nickells vs. *Atherstone*, 10 Q. B., 944.

The obligation to pay the difference between the new rent and the old, or the whole until a new lease was made, would arise, not from the lease, but from the supposed agreement between the landlord and the tenant. No recovery could be had for it *as rent*.

Hall vs. *Gould*, 13 N. Y., 137.
Bain vs. *Clark*, 10 Johns., 424.

With the tenant's obligation *under the lease*, there would also cease any obligation on the part of the surety. There was clearly no guaranty on his part of

the performance of an agreement made without his knowledge or consent, on a surrender of the lease, and his guaranty cannot be extended to cover such a case.

"The liability of a surety is not to be extended by "implication beyond the terms of his contract. *To "the extent, in the manner, and under the circum-"stances*, pointed out in his obligation, he is bound, "and no further. * * * He has a right to stand "upon the very terms of his contract, and if he does "not assent to any variation of it, and a variation is "made, it is fatal."

Per STORY, J., in *Miller* vs. *Stewart*, 9 Wheat., 630.

Any variation from the original contract, made without the consent of the surety, will discharge him. "The question does not turn upon the amount of dif-"ference, but the question is, whether the contract "performed by the plaintiff, is the original contract to "which the defendant was a party."

Per BAYLEY, J., in *Witcher* vs. *Hall*, 5 B. & C., 269.

See also

Bacon vs. *Chesney*, 1 Stark, 192.
Leeds vs. *Dunn*, 10 N. Y., 469, 477.
Stewart vs *McKeen*, 10 Exch., 675.
Bonar vs. *McDonald*, 3 H. L. C., 226.
Glyn vs. *Hertel*, 8 Taunt., 208.
Hone vs. *Brunskill*, 3 Q. D., 495.
Phillips ve. *Astling*, 2 Taunt., 206.
Pickles vs. *Thornton*, 33 L. T. R., 658.
Smith vs. *United States*, 2 Wall., 219, 237.
McMicken vs. *Webb*, 6 How., 292, 298.

Fourth.

THE JUDGMENT OF THE CIRCUIT COURT SHOULD BE REVERSED, AND THE CAUSE REMANDED, WITH DIRECTIONS TO ENTER A JUDGMENT IN FAVOR OF THE PLAINTIFF IN ERROR.

October Term, 1886.

JOHN CLINTON GRAY,
EDWARD C. PERKINS,
Of Counsel.

121-525

In the Supreme Court of the United States.

WILLIAM MILNE, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF WILLIAM M. WILSON, DECEASED,
PLAINTIFF IN ERROR,
vs.
ANN MARIA DEEN,
DEFENDANT IN ERROR.

No. 189.

Brief for Plaintiff in Error in Reply to Brief for Defendant in Error.

I.

The general denial in the answer of "each and every allegation of the complaint not hereinbefore admitted" is sufficient, and includes a denial of the allegation in the complaint (p. 8) that the tenant abandoned the premises.

The only allegation of the complaint admitted is that as to "the residence of the plaintiff and of himself (the defendant) and their citizenship, as stated in the complaint" (*Record, original page* 17), and there is no ambiguity as to

what is denied. This method of pleading has repeatedly been held proper and sufficient by the New York courts.

Youngs v. *Kent*, 46 N. Y., 672.

Smith v. *Gratz*, 59 How. Pr., 274.

Allis v. *Leonard*, 46 N. Y., 688, fully reported in 22 Alb. L. J., 28.

Greenfield v. *Ins. Co.*, 47 N. Y., 430.

There are numerous other adjudications in the New York courts on the point, but we deem it unnecessary to cite them, in view of the decision of this court upon the question in

Burley v. *German American Bank*, 111 U. S., 216.

But however the matter may stand on the pleadings, it was proved *by the defendant in error herself* that Mrs. Perry took possession on April 1st, and that when Mrs. Deen resumed possession she found Mrs. Perry's servant in occupied.

Mrs. Deen testified (*p.* 45):

"I left the premises the first day of November, 1873.

"Q. Whom did you leave in possession then?

"A. *Mrs. Perry.*

"Q. Was she there personally?

"A. Yes; she had this man John Burns with her, and he was the only one I found there when I took possession in April, 1874."

And at page 36:

"Q. Whom did you find in occupation of the premises?

"A. I found a man there who was with Mrs. Perry when she took possession of the house; his name was John Burns. * * * He came with them and with their things and assisted in bringing them in."

In the answer of the defendant in error in the suit in the State Supreme Court she avers, under oath (*p.* 93), that Mrs. Perry took possession on October 29th, 1873, and "denies that the said Mary C. C. Perry has never had possession of the said house, nor of the furniture therein." (p. 95).

The answer in the suit below carefully avoids the statement, which could not be made, because not true, that Mrs. Perry never entered into possession. Even if the allegations in the complaint in the suits in the Supreme Court were to be taken as evidence to the contrary, the most the defendant in error could claim would be that there was a conflict of evidence on the point. But if this is so, it was error for the court below to direct a verdict for the plaintiff below, and the point is covered by our fifth, sixth, and eighth assignments of error.

II.

The judgment in the Marine Court was properly and sufficiently pleaded as a defence in this action, though not, perhaps, with the technical accuracy required by the rules of common law pleading. The fact of the judgment was pleaded as a complete defence to the action, and the plaintiff was sufficiently informed by the answer of the nature of the defence. This is all that is required by the system of pleading, under the New York Code of Civil Procedure, when coupled with proper proof.

"The court may, upon the trial, or *at any other stage of the action, before or after judgment*, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding * * * by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by confirming the pleading, or other proceeding, to

the facts proved. And, *in every stage of the action*, the court *must* disregard an error *or defect* in the pleadings or other proceedings, which does not affect the substantial rights of the other party."

New York Code Civ. Proc., § 723.

As the objection, even if it is tenable, was not raised in the court below, and, if there raised, could have been obviated by amendment, it is clear that it did not "affect the substantial rights of the other party," and *must* be disregarded.

But the judgment was admissible under the general issue, and need not have been pleaded at all.

III.

We call the attention of the court to the fact that the Court of Appeals of the State did not, as might be inferred from a hasty perusal of the statement on page 8 of the brief of counsel for defendant in error, pass upon the defence set up in the suit in the Marine Court, but upon that set up in an action brought by the lessee and surety in the Supreme Court, to obtain a cancellation of the lease in question, on the ground of fraud. The judgment rendered in the Marine Court was never before any appellate court for review.

Neither is it the case, as might be supposed from the statement in the *third point*, on page 16 of that brief, that any final judgment was rendered by the Court of Appeals. The court below had decided that the lease was void because of the fraud practised in procuring it by the defendant in error here. Their decision was reversed and *a new trial ordered*.

Record, original page 115.

Wilson v. *Dean*, 74 N. Y., 531.

IV.

We waive any discussion suggested by the *second point* of the brief for defendant in error, as to whether proof of a stipulation discontinuing the action in the Marine Court, would avail to offset the effect of the judgment therein, as a bar to this action. The fact that such a stipulation, either oral or in writing, was made was distinctly denied by the witnesses for the defendant below. Mr. Bradbury Chetwood testified (*pp.* 134 *et seq.*) that the only stipulation entered into was an oral one, and that it contemplated only the discontinuance of the appeal taken from that judgment, and Mr. H. M. Walker's testimony (*p.* 136) was to the same effect.

The statement at the foot of page 13 of the brief for defendant in error, that "the counterpart of the written consent, which had been in the possession of the attorney of the defendant below for nine years, was produced and put in evidence," cannot be characterized as candid. The attorney for the defendant below produced a document which, according to his testimony, was brought to his office *some time after the trial during which it was alleged that he executed it*, with a request that he should sign it, which request he refused.

See his testimony at p. 137.

If the evidence as to the making of a stipulation was material, it should have been submitted to the jury, for it was conflicting, and it was error for the court below to direct a verdict upon it.

V.

We must protest against the obvious impropriety of the statements of counsel for defendant in error, in their brief,

as to what they allege to have occurred since the trial below in regard to the judgment in the Marine Court. New facts cannot, at this stage, be interpolated in the record. The cases cited by counsel at page 17 of his brief, where records were admitted in the court above, are merely to the point that record evidence, inadvertently omitted below, of facts existing at the time of the trial, and which might have been proved there, will be received in the appellate court to save a new trial, which must prove futile.

If the judgment below was erroneous when entered, it is, for our purpose, erroneous now.

Should this court allow proof that the marine court judgment has been vacated, and should *prima facie* proof to that effect be offered, we shall be prepared to meet it; meanwhile we are content with disputing the legality or propriety of its admission.

VI.

The principle sustained by the cases cited under subdivision I of the seventh point of the brief for defendant in error is not applicable here.

That principle is, that where a party to an *executory* contract is prevented from performing the conditions on his part by the interference of the other party, "he is bound to take active measures to render the injury as light as possible."

The principle is applicable only to suits for *damages* for breach of contract and, more scientifically stated, it merely amounts to this: That the injured party to a broken contract suffers no more damage than what he is unable to prevent.

The principle cannot be applied where the injured party sues, not for damages, *but upon the contract*, having fully

performed his part of it. That is the position of the defendant in error here. She does not sue for damages for breach of contract, but *for rent*; this of necessity involves the assumption that Mrs. Perry was her tenant, and she cannot escape from it.

Mrs. Perry having gone into possession under the lease, it is doubtful whether, even if she had afterwards abandoned possession, the defendant in error would have had the right to treat the lease as rescinded, and to sue for damages. It is unnecessary to discuss this point, for she did not do this. She chose to treat the contract of lease as subsisting; she brought two actions *for rent* against the tenant and the surety (*Record, pp.* 93 *and* 94); she insisted, when sued in the Supreme Court, that the lease was valid and subsisting (*Record, p.* 92), and in this very action she sues for rent due under the lease. Having claimed, and still claiming, the rights of a landlord, she cannot deny to Mrs. Perry (with whose rights those of the plaintiff in error are co-extensive) the rights of a tenant. It is upon this principle that we claim that the conduct of the defendant in error in re-entering and reletting the premises, being inconsistent with the rights of her tenant, terminated the lease.

JOHN CLINTON GRAY,
EDWARD C. PERKINS,
of Counsel.

WASHINGTON, *April 5th*, 1887.

12-525

Supreme Court of the United States.

ANN MARIA DEEN,

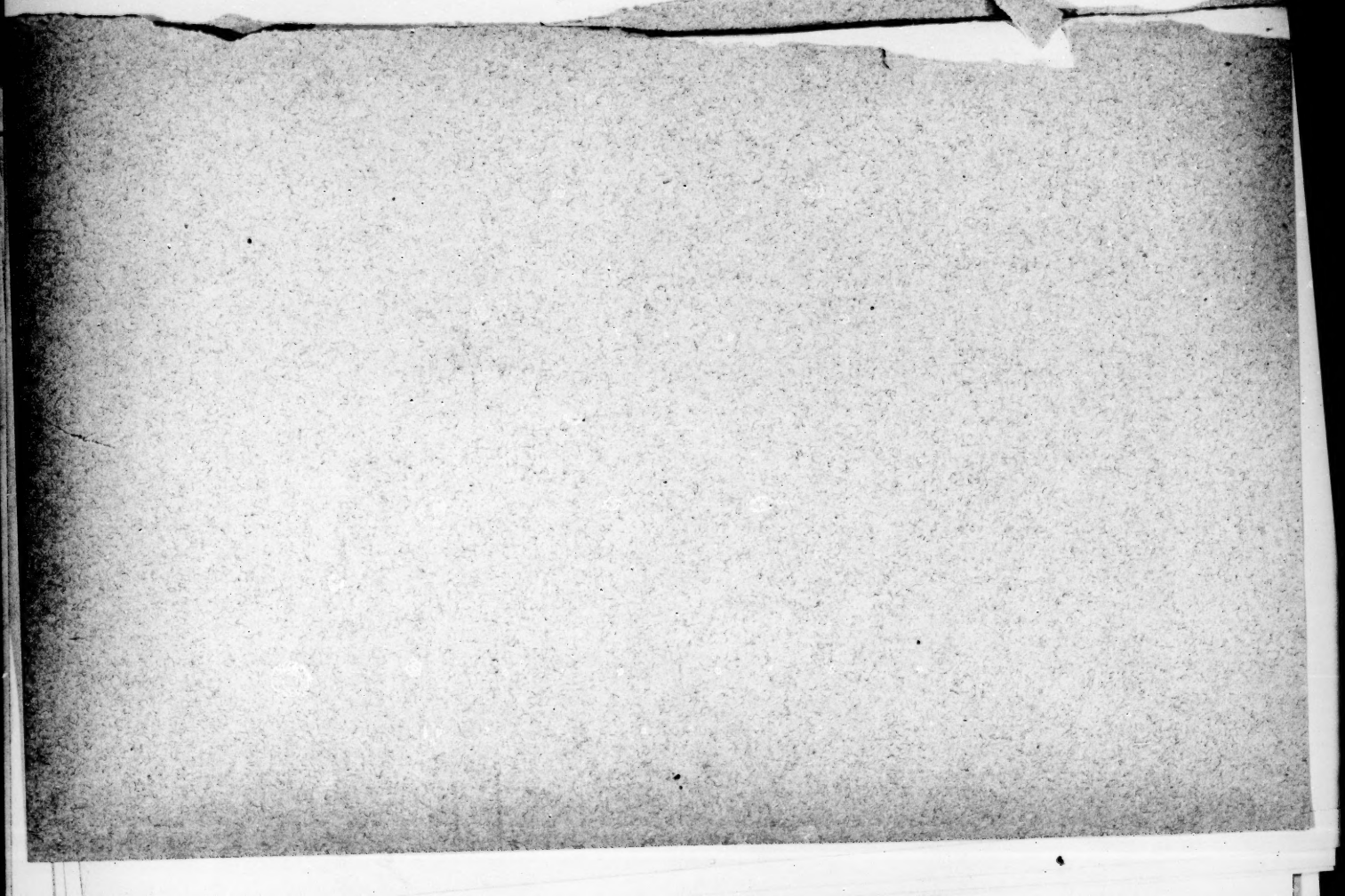
Defendant in Error,

ads.

WILLIAM MILNE, EXECUTOR OF WILLIAM M. WILSON, DECEASED,

Plaintiff in Error.

BRIEF FOR DEFENDANT IN ERROR.



Supreme Court of the United States.

No. 189.

ANN MARIA DEEN,
Defendant in Error,

ADS.

WILLIAM MILNE, AS EXECUTOR OF WILLIAM M. WILSON, DECEASED,
Plaintiff in Error.

BRIEF FOR DEFENDANT IN ERROR.

The Statement in the brief for plaintiff in error is inaccurate in its analysis of the pleadings, and additional facts are necessary to be stated for the complete understanding of the case.

As to the Pleadings.

The answer does *not* contain a denial of the abandonment of the premises by Mrs. Perry, the tenant.

The only denial is the concluding paragraph, "of each and every other allegation of the complaint contained not hereinbefore admitted" (fol. 23).

Such a denial has been repeatedly held to raise no issue.

McEncroe *v.* Decker, 58 How. Pr., 250.
Chamberlin *v.* Amer. Natl. Life and Trust Co., 5 Weekly Digest, 129.
People *v.* Snyder, 41 N. Y., 400.
People *v.* Northern Railroad Co., 53 Barb., 101.

The gist of the first alleged defense is that the lease and guarantee set forth in the complaint were never executed and were never delivered, and that possession was never taken thereunder (Record, fol. 17).

What follows of the first defense is merely by way of amplification of the allegation of non-execution and non-delivery. The alleged circumstances are stated in detail; and the defense concludes with the allegation of the abandonment of all attempts to obtain said house furnished or the delivery of the lease. It is, at least inferentially, alleged that possession was never had under the lease (Record, fol. 22).

The so-called second defense of the answer in which an attempt was made to allege the former adjudication in an action in the Marine Court of the City of New York, *does not state what the issue was in that action*; nor does it allege that the judgment *remains unreversed*, or *unvacated* or *in full force*, nor does it contain any equivalent allegation (fol. 23).

As to the Facts

It should be noted that the lease from the defendant in error to Mary C. C. Perry of the dwelling house known as No. 4 East Thirtieth street, in the City of New York, was, "*with the furniture therein, to be used as a dwelling house and for no other purpose whatever*" (Record, page 5, fol. 12).

Also that it contains a covenant that the lessee should not assign the lease nor underlet the whole or any part of the premises, nor make any alteration therein without the written consent of the party of the first part

(the lessor), and that she should not occupy or use the premises, nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise without the like consent (fol. 13).

Also that the surety clause, written upon the lease, and signed and sealed by the plaintiff in error, guarantees the payment of the rent and performance of the covenants contained in the lease, and the payment of all damages that may arise in consequence of the non-performance of the covenants "WITHOUT REQUIRING NOTICE OF ANY SUCH DEFAULT FROM THE SAID PARTY OF THE FIRST PART." (Record, p. 6, fol. 15.)

We would also draw attention to the important fact that the counsel for the the defendant below expressly conceded "that the plaintiff did have a right to take possession" of the premises (fol. 44). Thus the proof on that subject was curtailed, and further proof rendered unnecessary.

But it was proved that one John Burns, who had formerly been a servant of the plaintiff in error, was in the apparent occupation of the premises, and that the carpets, marble mantle, mirror and frame, and all those surroundings, were very much damaged by fire; the second story front room was in a bad condition; that the furniture had been badly treated (Record, fol. 45), and that the house had been permitted to become a resort for disreputable females (fol. 54).

These facts were proved by the plaintiff and by the Rev. Dr. Burchard, and were entirely uncontradicted.

Record, page 13, fol. 37; page 19, fol. 54.

This John Burns was first brought to the house by Mrs. Perry and Mr. Wilson the day that the lease was signed (fol. 38).

In fact the whole case shows that Mr. Wilson and Mrs. Perry were joint actors, and occupied a relation closer than that of principal and surety.

But as has already been stated the plaintiff in error expressly disclaims in his answer any occupation of the premises.

On March 27th, 1884, the plaintiff duly gave to Mrs. Perry, the tenant, notice that, inasmuch as she had abandoned the premises to the man John, they would be taken possession of and let for her account, holding her for any deficiency and for damages; also asking that in case she had any objection to that course being pursued she should address such objections to Mr. Hill, the lessor's attorney, at No. 62 Wall street, New York.

Record, page 20, fol. 57.

This notice was evidently intended for both Mr. Wilson and Mrs. Perry. But it is to be presumed that the lessor did not know the residence of the surety and therefore served it on the lessee for both. No response to it was received from either.

Record, page 16, fol. 46.

Before the notice was served an action had been commenced *jointly by Mr. Wilson and Mrs. Perry*, against the plaintiff below for the cancellation of the lease, *alleging that possession had never been taken thereunder.*

That action was commenced March 11th, 1874, sixteen days before the date of the notice.

Record, page 27, fol. 83, pages 28–31.

Plaintiff took possession, for the preservation of the property, in pursuance of the notice, April 29, 1874 (fol. 74), having waited more than a month for a response to her notice, but she did not succeed in procuring a tenant until December, 1874 (fol. 38).

Record, pages 13–15, fols. 38–43.

After the recovery of the verdict by the defendant in the Marine Court of the City of New York, the action herein before referred to, brought by Wilson and Perry against Mrs. Deen, was commenced in the Supreme Court of the State of New York.

The summons in that action is dated, and the complaint was sworn to March 11, 1874 (fols. 84–91).

The last mentioned action was in the nature of a bill in equity; Wilson and Perry alleged, in substance, the

incomplete execution of the lease and guaranty clause, stating alleged false representations and promises as to the furniture, which was to be placed therein, the actions in the Marine Court and the verdict in one of them; and prayed for the cancellation of the lease, and that actions thereon be restrained.

It was also alleged in the complaint in that action as follows:

"And plaintiffs further show that neither the said William M. Wilson nor the said Mary C. C. Perry have or ever had possession of the said house No. 4 East Thirtieth street, in the City of New York, nor of the furniture therein, but said house and furniture is and ever since October 29, 1873, has been in the possession of the said defendant Ann Maria Deen."

Record, page 31, fol. 90.

Issue was joined in that action upon the merits.

See Answer, fols. 19 and 92–96.

The cause was subsequently tried in the Supreme Court before Judge Van Brunt.

Testimony was given on the part of the plaintiff below, showing that on the trial of that action, as soon as it appeared before the trial judge that there were two actions pending in the Marine Court, in one of which judgment had been obtained, he inquired what the issues were, and on the production of the pleadings thereon, stated in substance that the issues were the same as in the action before him. After some discussion he stated that he would not proceed with the trial of the equity action until the action in the Marine Court, in which a verdict had been obtained was disposed of. The counsel for the plaintiff in that action then offered to discontinue both actions in the Marine Court, which offer was accepted.

Written stipulations were thereupon prepared and signed in duplicate, one of each of which was delivered to the attorney for Mrs. Deen, which were subsequently lost before any order was entered thereon. The attorney for the de-

fendant below then, pursuant to notice, produced the stipulations relating to the case in which judgment had been entered, as set out at the top of page 45.

This stipulation had been in the possession of the attorney for the defendant below, from its date, December 2, 1874, to the time of the trial May, 16th, 1883—nearly 9 years. These facts were testified to by the attorney and counsel who represented the plaintiff below on the trial in the Supreme Court. He was corroborated by G. A. C. Van Buren (Record, p. 48, fol. 130).

By Benjamin C. Thayer, a lawyer present at the trial (Record, p. 49, fol. 131), and by the plaintiff (Record, p. 49, fol. 132).

Robert Macklin, the official court stenographer in the case of Wilson and Perry *against* Deen, produced his minutes of the trial, and read therefrom the following consent entered in the minutes of the Court for the trial:

"*By consent, the action in the Marine Court in which a verdict was rendered, is discontinued without costs to either party.*"

This he testified was a correct transcript of what transpired in open Court December 2, 1874 (Record, p. 43, fol. 119).

This testimony was not directly contradicted by any witness.

The only witnesses on the part of the plaintiff in error who were present at the trial of the action before Judge Van Brunt who testified on this subject were Bradbury C. Chetwood (page 50, fol. 134) and Henry M. Walker (p. 52, fol. 136).

Chetwood was the counsel who tried the cause on behalf of Wilson and Perry. He did not deny that the entry in the stenographer's minutes was correct, but did dispute the giving of a written stipulation.

He testified as follows:

"The question was whether witness would consent to *discontinue the proceedings then going on in the Marine Court.* The result was they went on in the Supreme Court. *At that time witness gave an oral consent to suspend or discontinue proceedings in the other Court.*"

Record, p. 51, fol. 134.

Henry M. Walker, who was a witness before Judge Van Brunt, testified on behalf of plaintiff in error: "The Judge seemed to object to the trial going on because the Marine Court suit was then pending, and that the then pending proceedings in the Marine Court should be discontinued."

Record, p. 52, fol. 156.

On cross-examination the witness testified that Judge Van Brunt's decision was that either they should finish up the suit in the Marine Court or that the pending proceeding in the Marine Court should be discontinued (fol. 136).

It will be seen that both of these witnesses substantially concede the verity of the entry in the stenographer's minutes.

The only real question on which there was a conflict of evidence as to what took place before Judge Van Brunt was as to whether the *written* consents, counterparts of which were produced by the attorney for the plaintiff in error, were then given. There was really no dispute that the verbal consent to discontinue the action was given, and was entered upon the record.

Nor was there any dispute as to there having been a consent to discontinue the action. The real conflict was as to whether the consent went so far as to provide for the vacation of the judgment.

After this consent was given in open Court, the trial proceeded before Judge Van Brunt without further reference to the judgment or proceedings in the Marine Court. His findings of fact, and conclusions of law, constituting his decision, conclusively show that the judgment in the Marine Court had been so done away with as to be no longer a fact or element in the case. No reference is made therein to the proceedings in the Marine Court.

Record, pp. 36–37; fols. 100, 103.

The decision of the learned judge holding the lease to be void on the ground that it never had been completely executed, though affirmed at General Term of the Supreme Court (fol. 104–106), was reversed in the Court of Appeals (fols. 114–116; see also Wilson *vs.* Deen, 74

Circuit Court are not the same. The same remark applies to the other cases cited by plaintiff in error.

(*b*) The issues in the Marine Court action was entirely different from those presented in the present action. The Marine Court action was brought for rent for the month of December, 1873.

The answer in that action alleged that the signature of Mary C. C. Perry, and of the defendant in that action (Wilson) to a paper purporting to be the lease was obtained by false and fraudulent statements (Record, p. 24; fol. 71). And it was admitted that the only issue tried in that action was fraud in procuring the lease (fol. 77). It was not alleged in that case that the lease had ever been disaffirmed. The answer in the present action does not allege fraud, but the gravamen of the first defense in that action is that the lease and guaranty set forth in the complaint were never executed, and never delivered (Record, page 7; fol. 17).

It is true that the answer proceeds to state with considerable detail, that the plaintiff below made certain representations as to furniture alleged to have been missing, and promised to supply deficiencies; that the papers were prepared in pursuance of those representations, but were incomplete; that Mrs. Perry from time to time demanded the performance of said promises, but they were never performed, and the alleged result is stated in the concluding portion of the defense as follows, "that said Mary C. C. Perry after such unsuccessful demands abandoned, of necessity, all further attempts to obtain said house furnished or the delivery of said lease" (Record, p. 8; fol. 22).

In other words it is distinctly asserted that the lease never was delivered, and that possession was never taken thereunder.

Now, as to this defense, the Court of Appeals held that proof of contemporaneous or preceding oral stipulations not embraced in the lease was not admissible either in law or in equity to effect the covenants or agreements therein contained.

Wilson *v.* Deen, 74 N. Y., 531.

The record shows that the execution and delivery of the lease and surety clause was proved, and the lease and guaranty put in evidence without objection (Record, page 10, fol. 31; p. 12, fol. 35).

At fol. 35 it is stated in the bill of exceptions "the plaintiff further proved the due execution by the defendant of the following agreement, which was attached to said lease, and which was delivered to plaintiff by defendant. It was also proved that the first month's rent under the lease was paid by Mr. Wilson's check for $450" (fol. 35, at the bottom of page 12).

In view of these facts the learned Circuit Judge ruled, following the decision of the Court of Appeals in Wilson *v.* Deen, that testimony as to declarations and conversations prior to the execution of the lease were not admissible in evidence (Record, p. 20, fol. 59; p. 22, fols. 63, 64, 65; p. 26, fol. 66).

These rulings were so obviously correct that they are not even made the ground of any assignment of error by the counsel for the plaintiff in error.

(*c*) It is to be observed also that the answer in the Marine Court action—although the action was between Mrs. Deen the lessor, and Wilson the surety, does not in terms attack the validity of the guaranty, which was a separate and distinct paper, but asserts that the signatures of Mrs. Perry, and of the defendant to the *lease* were obtained by false and fraudulent representations.

It may be said that this is a technical view of the issue. But the answer to the suggestion is that the defense of estoppel is of itself technical, and may properly be met by technicalities.

(*d*) There was no judgment in the Marine Court action declaring the lease void. The record simply shows that the plaintiff failed to recover the month's rent for which she sued the defendant.

For ought that appears it may have been that the jury considered that there had been some fraudulent collateral promises which would be satisfied by extinguishing the claim for the first month's rent.

(*e*) The action in the Marine Court was simply and only for the recovery of one month's rent (fol. 70).

It was not, therefore, the same action or character of action as that alleged in this cause which was substantially for the recovery of damages for the non-performance of the covenants of the lease.

II.—The judgment of the Marine Court was not pleaded in bar to the cause of action alleged in the complaint. The answer in that respect is fatally defective (fol. 23).

The answer alleges that the action in the Marine Court was for rent for the month of December, 1873, and that it was for the same cause of action as that set forth in the complaint therein. It certainly was not for the same cause of action set forth in the complaint in this cause. It was for only a part of the *rent* and was not for damages as the present action practically is. The answer does not allege what the issue was in that action. We are left to conjecture as to what it may have been. It is simply stated that judgment was given against the plaintiff upon the merits in that action. That does not inform us as to the question or issue which was tried. It may be true that judgment was so given, and yet no question was then tried which was at issue in this action.

It is no answer to this point to say that the proof supplied the defect, even if it were true, as we submit that it was not. The defense must be alleged as well as proved.

"Facts proved, but not pleaded are not available to the party proving them."

Field *v.* The Mayor of N. Y., 6 N. Y., 179.
See also Piat *v.* Vattier, 9 Pet., 405.
Harrison *v.* Nixon, *id.*, 483.

It is for the plaintiff in error to point out distinct and positive error. Otherwise the judgment below will not be disturbed. Every inference and intendment will be in support of the judgment.

Ventress *v.* Smith, 10 Peters, 161.
Coffee *v.* Planters' Bank, 13 How., 186.

Second Point.—The judgment in the Marine Court of the State of New York, although existing upon the records, had in fact been done away with by the acts and agreement of the party.

I. The uncontradicted evidence shows that after judgment was obtained in the Marine Court, and after an appeal had been taken therefrom, the action in equity was commenced by Wilson and Perry *against* Mrs. Deen, in the Supreme Court of the State of New York seeking a judgment for the cancellation of the lease and guaranty. In the complaint in that action, the pendency of the action in the Marine Court, the recovery of a verdict therein were alleged. On the trial of that action, the judgment in the Marine Court was found to be an obstacle in the way of the progress of the action. The precise view taken by the trial judge in that action is not material. It is sufficient that he regarded it as an obstacle in the way of proceedings in the action, and held that in some manner it must be removed and done away with before the action in the Supreme Court could further proceed.

That *something* was done to remove that obstacle, is conceded on all hands. The only question is as to what that something was.

The stenographer's minutes of the trial of that action show that it was then and there consented in open Court that the action in the Marine Court in which a verdict had been rendered should be discontinued (Record, p. 43, fol. 119).

No one has the temerity to deny that this was a faithful and true record. The only point of dispute is as to whether the agreement of the parties was then and there reduced to writing, as well as being entered upon the minutes of the Court. On this question there is conflict. The counsel for the defendant in error testified that there was a consent then and there prepared and signed (Record, p. 44, fol. 122). In this he is corroborated by three witnesses (fols. 130–131–132), and the counterpart of the written consent which had been in the possession of the at-

torney of the defendant below for nine years was produced, and put in evidence (page 45).

It is also worthy of particular notice that Mr. Wilson, although he was present at the trial of the action before Judge Van Brunt, and was a witness on the trial of this cause, did not undertake to deny the truth of anything that was testified to by Mrs. Deen's attorney (p. 26, fol. 77); also that in his answer he omits the usual and material allegation "that the judgment remains in full force and unvacated."

But waiving all questions as to whether or not the written consent was then and there signed, or was afterwards made, it is undisputed that the consent was given doing away with the judgment. A formal consent was given in open Court, the effect of which was to do away with the judgment in the Marine Court.

This appears:

(1.) By the testimony of the counsel for the plaintiff below and three witnesses by whom he is corroborated.

(2.) By the testimony of the stenographer and his minutes, and his minutes of the official record.

(3.) By the subsequent proceedings in the case showing that the case was heard and decided by Mr. Justice Van Brunt without any reference to the judgment in the Marine Court, which, if it had not been done away with, would have been an important and controlling fact in the case.

Not only does this evidence stand substantially undisputed, but it is expressly admitted by Mr. Chetwood, who was counsel for Wilson and Perry on the trial before Judge Van Brunt, that he, witness, gave an oral consent to *suspend or discontinue proceedings in the other Court* (p. 51, fol. 134).

And Mr. Walker, the only other witness, who testified on behalf of the defendant below as to what occurred before Judge Van Brunt, that Judge Van Brunt's decision was, "either that they should finish up the suit in the Marine Court or that the pending proceedings in the Marine Court should be discontinued."

Thus it appears that there was a substantial agreement as to there having been an oral consent to do away with the proceedings in the Marine Court.

We submit, that this oral consent having been made in open Court and the substance of it entered upon the minutes of the Court, was as effectual as if it had been in writing.

An oral consent made in open Court, although it has reference to proceedings in another cause, will be enforced.

Jewett *v.* City of Albany, Clark's Chancery, 253.

Phillips *v.* Wicks, 38 N. Y. Supr. Ct. Repts., 74.

Such a consent, made in the progress of the trial, constitutes a valid and irrevocable agreement. Causes are tried every day and the most important matters finally determined on such consent.

2. The judgment in the Marine Court having been once done away with was forever abrogated. The plaintiff in error was thereafter estopped from making use of it. He received full consideration for the agreement in being permitted to proceed with the trial of his cause and obtain, as he did then, an adjudication of the Court as to the validity of the lease.

The contention of the counsel for the defendant below was that although a consent was given to the discontinuance of the action, that nothing was said about vacating the judgment, and that, therefore, the judgment remained in full force.

This position was neither morally sound nor well founded in law. It is clear that what the parties intended was to anuul the judgment, take it out of the way, and try the issues *de novo* in the Supreme Court.

By entering into this stipulation, the plaintiff in error was enabled to obtain an adjudication of the validity of the lease by the Supreme Court. It is in extreme bad faith that he now seeks to show that the intention of the parties was not carried into effect by the language of their stipulation.

But such is not the case.

The New York Court of Appeals in a recent case has held—

"That where a suit is discontinued after judgment, the adjudication concludes no one, and is not an estoppel or bar in any sense."

Loeb *v.* Willis, 100 N. Y., 231.

The discontinuance removed the record altogether.

In the language of Earle, *J.*: "By the discontinuance of an action the further proceeding in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been. If a suit be discontinued *at any stage*, or the judgment rendered therein be set aside, or vacated or reversed, then the adjudication therein concludes no one and is not an estoppel or bar in any sense" (p. 235).

See also cases there cited.

The defendant in error is not limited to the precise ground upon which the decision of the Circuit Judge was placed, but may show that the decision was right, although an erroneous reason may possibly have been given for it. The plaintiff in error cannot object that the judgment is for less than it ought to have been.

Third Point.—The effect of the judgment in the Marine Court as an estoppel was done away with by the action in equity in the Supreme Court.

The plaintiff in error must take one of the two positions, either of which is fatal to the effect of that adjudication.

1. If the Marine Court judgment was a *fact* in the equity action, then the judgment of the Court of Appeals is an adjudication between the parties that the prior judgment was not an annulment of the lease, and did not prevent the recovery of the rent.

2. If it was *not* a fact in that action, then, as it was alleged in the complainant therein, it was done away with by the act of the parties during the progress of the trial of that action, and, therefore, was no longer of any force by way of estoppel.

Fourth Point.—The judgment in the Marine Court has been wholly annulled and vacated since the trial of this action by the judgment of the Supreme Court of the State of New York, which has been carried into effect in the Marine Court by the actual cancellation of the record there.

The defendant in error now offers exemplified copies of the records in those Courts, proving conclusively the facts here stated.

This Court will not reverse the judgment by reason of any error which may have been committed in regard to the effect of that judgment, which has now been done away, and would be no obstacle to a recovery on a new trial.

The case of Pugh *v.* McCormick, 14 Wall., 361, is in point.

This Court is not inclined to reverse a judgment, unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial, and that the same party will be entitled to judgment if a new trial is granted.

Id., page 374.

Records will be received in an appellate Court for the purpose of upholding a judgment though not for the purpose of reversing it.

Bank of Charlestown *v.* Emeric, 2 Sandf. Supr. Ct. R., 718.
Jarvis *v.* Sewell, 40 Barb., 455.
Rockwell *v.* Merwin, 45 N. Y., 168.
Stilwell *v.* Carpenter, 62, *id.*, 639.
Wines *v.* The Mayor, 70 *id.*, 614.
Dakota *v.* Glidden, 113 U. S., 225.

If it be urged that it does not appear but that the judgment may be reversed on appeal, the sufficient answer is that the judgment which was sought to be made use of by the plaintiff in error in the Court below, was pending on appeal at the time of the trial if it had not been then vacated.

But the judgment of the Supreme Court has been carried into effect by the actual cancellation of the record in the Marine Court. So that as a matter of fact it is conclusively established that such record no longer exists.

Fifth Point.—The plaintiff below was not deprived of her remedy upon the covenants of the lease against the surety by taking possession of the property for the purpose of its presrvation, and letting the same to the best advantage upon due notice to the tenant.

I.—If the present counsel for the plaintiff in error had been present at the trial of the action, they would hardly have fallen into the error of claiming that Mrs. Deen was chargeable with any eviction of the lessee from the abandoned premises. Before any notice was given by Mrs. Deen of her intention to take possession of the property for its preservation, and to relet it for the account of the tenant, an action had been commenced in the Supreme Court of the State of New York, by Mrs. Perry and Mr. Wilson, jointly, in which they alleged under the solemnity of their oaths, that neither of them ever had had possession of the house, or of the furniture therein, but that said house and furniture had been in the possession of Mrs. Deen from the 29th of October, 1873 (Record, page 31, fol. 90).

In view of this allegation, the fact that John Burns who had been a former servant of Mrs. Perry, and who had been first brought to the house by Mr Wilson and Mrs. Perry, together (Record, p. 13, fol. 27; p. 16, fol. 45), was left to occupy the premises and to use them for immoral and disreputable purposes, to their very great injury,

shows that Mrs. Perry and Mr. Wilson were not only determined to disregard their obligations under the lease, but that they were desirous of heaping injury upon the plaintiff, and of making their violation of the contract as oppressive as possible.

The claim now made, in view of the allegations of the answer to the effect that neither Mrs. Perry nor the plaintiff in error ever took possession, that by taking charge of the property the defendant in error evicted the tenant, is most extraordinary.

The statement contained in the brief of the plaintiff in error that there was a complete failure to show any abandonment by Mrs. Perry is only pardonable in view of the want of familiarity by the counsel for the plaintiff in error with the allegations in the pleadings, and the facts proved upon the trial.

II.—The criticisms upon the notice given by Mrs. Deen to Mrs. Perry are hypercritical. The fact that it begins "Dear Sir:" does not militate at all against the substance of the notice which was that Mrs. Deen proposed to take possession of the premises unless objection thereto was made. It was quite sufficient to inform Mrs. Perry of what Mrs. Deen intended to do, and that was the main object and purpose of the notice.

At the time that it was served upon Mrs. Perry, she and Mr. Wilson were acting in concert for the purpose of procuring a judicial cancellation of the lease.

Notice to one was therefor notice to both of them.

But the plaintiff in error had expressly waived notice of any default by the lessee (p. 6, fol. 15).

Sixth Point.—The suggestions in the preceding point seem to us to effectually dispose of all the assignments of error which relate to the effect of reletting the premises.

The fourth assignment of error is that "The Court below erred in refusing the request of the counsel for the de-

fendant to hold and decide that the possession of the house in question that Deen took in April, 1874, dispossessed Mrs. Perry, and that Mrs. Perry if accountable, was not accountable for the rent after such possession was taken."

Obviously there could be no *dispossession* so long as Mrs. Perry and Mr. Wilson both disclaimed that either of them ever had possession.

The fifth assignment of error is of like effect that "The Court below erred in refusing the request of counsel for the defendant that it submit the question to the jury whether or not the possession as taken by Mrs. Deen did not in and of itself dispossess Mrs. Perry."

The sixth assignment of error was that "The Court below erred in refusing the request of counsel for the defendant that it submit to the jury the question whether or not John Burns was in possession of the house in question under Mrs. Perry after the execution of the lease, and up to the time plaintiff entered into possession as claimed by her in April, 1874."

And the seventh assignment of error is that "The Court below erred in refusing the request of the counsel for the defendant that it hold and decide that the possession of the premises in question as taken by Mrs. Deen in April, 1874, was an ouster or eviction of Mrs. Perry, and that Mrs. Deen could not recover for rent accruing or becoming due after such dispossession or ouster took place."

And the eighth, that "The Court below erred in refusing the request of the counsel for the defendant that it submit to the jury the question whether or not the possession of the premises taken by Mrs. Deen in April, 1874, was not an eviction of Mrs. Perry."

These propositions are most extraordinary, in view of the fact, to which we have already referred, that both Mrs. Perry and Mr. Wilson disclaimed ever having been in possession of the premises and of the fact that the counsel for the defendant below expressly admitted that the plaintiff did have a right to take possession (Record, p. 16, fol. 44).

There certainly can be no eviction or dispossession of the

tenant so long as it is conceded that the landlord had the right to take possession.

Indeed the fact is that although formal requests appear in the bill of exceptions to have been made, to which these assignments of error refer, there was really no contest on the trial upon any subject except as to the validity and effect of the judgment in the Marine Court.

This is apparent from the opinion of his Honor Judge Shipman, delivered in the decision of the case.

Seventh Point.—The defendant in error had a clear legal right to take possession of the abandoned premises for their preservation, and for the purpose of rendering the injury to her as light as possible, and for the same purpose to let them for the account of the tenant without, in any manner impairing her obligations under the lease against the surety.

I.—It is an exceedingly well established principle of law that when a person is liable to be injured by the breach of covenant or wrongful act of another he is bound to take *active measures* to render the injury as light as possible.

This is a principle believed to be of universal application.

Hamilton *v.* MacPherson, 28 N. Y., 72.
Hecksher *v.* McRay, 24 Wend., 304.
Clark *v.* Massiglia, 1 Denio, 317.
Dillon *v.* Anderson, 43 N. Y., 231.
Howard *v.* Daly, 61 *id.*, 362.
Polk *v.* Daly, 14 Abb., N. S., 156.
Warren *v.* Stoddard, 105 U. S., 229.

In Hamilton *v.* MacPherson Judge Selden says:

"The law, for wise reasons, imposes upon the party subjected to injury, from a breach of contract, the *active duty* of making reasonable exertion to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured

party through negligence or wilfulness allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him."

So in Heckscher *v.* McRay it is said:

"The rule is that where the party is entitled to the benefit of a contract, and can save himself from the loss arising from a breach of it at a trifling expense or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expenses he could not prevent" p. 229.

It is well settled in Courts of Admiralty and of Common Law, that when a charterer of a vessel fails to supply a cargo or refuses to perform a charter party, it is the duty of the owner to secure another freight or a new charter with as little delay as possible.

Boetjer *v.* Boers, 7 Ben. D. C., 289.
Ashburner *v.* Balchen, 7 N. Y., 262.
Duffy *v.* Hayes, 15 Johns., 327.
Hechscher *v.* McRay, 24 Wend., 304.

II.—This is good law as well as natural equity and sound morality, and no good reason can be given for not applying it, to demises of real estate as well as to other contract obligations.

There is no ground for the technical rule which the counsel for the plaintiff in error seeks to apply. The claim that the defendant in error was bound to leave the premises unoccupied to the end of the term in order to hold the tenant and her surety to the covenants of the lease is without foundation in any principle of natural justice, and is not sustained by authority.

In order to effect a termination of the relation of landlord and tenant, there must be a surrender and acceptance either by act of the parties or operation of the law.

Beal *v.* White, 94 U. S., 389.

There must not only be a surrender, but an acceptance as well, and in order to constitute an acceptance, the intention of the lessor is material.

If the tenant abandons and the landlord relets the premises, giving the tenant notice that he does it for and on his (the tenant's) account, the surrender is not established.

Peter *v.* Kendal, 6 B. & C., 703.
Walls *v.* Atcheson, 3 Bing, 362.
Auer *v.* Penn, 99 Penn. St., 370.
Bloomer *v.* Merrill, 1 Daly (N. Y. C. P.), 485.
Meyer *v.* Smith, 33 Ark., 627.
McAdam on Landlord & Tenant, Sec. 209.

In Walls *vs.* Atcheson (3 Bing, 362), the lessee quit in the middle of the month, and the lessor let them to another person. There being no evidence to show that the lessor let them on account of the lessee, the Court held that he had rescinded the contract.

The Court say: "She ought to have given the defendant notice of her intention; that her intention was to let the premises solely on his account."

In Bloomer *v.* Merrill, the tenant informed the landlord that he should leave the premises at a specified time. The landlord told him if he did he should let the premises on his (the tenant's) account and hold him responsible for the rent; the tenant moved out and the landlord sent a person to occupy the house. It was held not to amount to a surrender, and that the tenant still remained liable for the rent.

In Auer *v.* Penn, 99 Penn. St. R., is directly in point. One of the assignments of error in that case was that the judge charged as follows:

"If a man refuses to continue your tenant, gives up the house into your hands, why, then, you have the right to put a bill upon the house, and try to rent it; because, if you rent it it is so much saved, so much saved to the surety of the tenant, because you have to give an account of every cent you make out of the house, and certainly it is much better for the tenant that the landlord should rent the house and get something for it than to lock the door and lay by and sue the tenant or surety for the whole amount of the rent for the whole term for which he has taken it; so that being for the benefit of both parties, it is now presumed that the landlord has accepted a surrender, that he has taken and leased the house.

On appeal the Court in bank say:

"We see no error in this case. It is good sense as well as good law" (p. 376).

The same language applies with much force to the facts in this case.

In Myer *v.* Smith, 33 Ark., 627, it was held that where the lessee abandons the leased premises, refuses to pay rent, and repudiates his tenancy without any fault of the lessor, the latter may stand upon the contract of leasing and recover the whole rent; or he may in such case take possession and re-rent the premises for the benefit of whom it may concern, crediting the proceeds upon his lease.

In MacAdam on Landlord and Tenant, Section 209, it is said "As it takes two persons to make a valid contract, it takes the same number to unmake or rescind one. Hence the consent of the lessor is necessary to a valid surrender of the term demised."

It would indeed be very strange if the landlord was compelled to elect between allowing his premises to remain unoccupied, or, worse, to be inhabited by persons of ill fame over whom the tenant claims no control, and to allow his property to go to destruction, or else consent, by entering upon the premises, to a release of the obligation of his tenant.

The cases cited by the counsel for the plaintiff in error do not sustain this view.

In all of them there was an unqualified entry by the landlord without notice or anything to show that his intention was to let the premises for the account of the tenant. Such an entry undoubtedly terminates the tenancy.

III.—This is an extreme case and there is no case to be found in the books like it.

The demised premises were a first class dwelling house in the City of New York, *furnished*. They were let for a term of nearly three years. The tenant instead of occupying them herself repudiated the lease and claimed no possession thereunder. She allowed her former servant

to go into the premises and to use them for disreputable purposes, calculated to very greatly injure their value, if not to destroy them altogether.

Is it possible that the law relating to demises of real estate is so unreasonable and out of harmony of all other principles applicable to contracts, as to hold that the owner of the property must choose between allowing his property to be thus practically destroyed or assent to a surrender of the premises?

If any such a rule of law ever existed, it is quite time that it was abrogated. This Court surely will not sanction it unless compelled to do so by controlling authority. No such authority has been referred to in this case.

IV.—The evidence in this case plainly shows an assent by the tenant to the reletting by the lessor of the premises for the tenant's account. Notice was duly given of the intention so to do. The notice was in such form as to require a response to it, and that silence gave consent. After waiting one month for a response the lessor had a right to assume that the proposition was accepted.

No notice to the surety was necessary for the reason that by the very terms of his agreement he had expressly waived such notice (fol. 15).

Furthermore he had commenced an action jointly with the lessee for the cancellation of the lease. This shows that he did not claim or desire any notice.

The only purpose which could have been legally served by giving notice to the surety, would have been to put him in a position to avail himself of the right of subrogation to the position of the tenant, if any such right existed. It probably did not, especially in view of the clause forbidding an assignment of the lease or underletting without consent.

But no such notice was necessary to the surety, for the reason that he already knew that the tenant refused to occupy the premises.

If he wished to avail himself of the right of subrogation, it was for him to act as soon as the tenant abandoned her position.

Moreover, he had taken an attitude in his suit in conjunction with the tenant repudiating the lease, which was wholly inconsistent with the exercise of any right of subrogation. *It was an effectual disclaimer of any such right.*

Besides, having joined in an action with Mrs. Perry, one notice to either of them was sufficient for both, so long as that action was pending.

Again, there was no point made in the Court below upon the question of notice. It cannot, for the first time, be made here.

V.—There is no ground for the claim on behalf of the plaintiff in error, that the notice to the tenant and her tacit assent thereto, worked a change of the contract, release and the surety.

Morgan *v.* Smith, 70 N. Y., 537, is in point, and on this point cannot be distinguished from the present case.

As is there said by Folger, *J.*: The surety had left to him all the rights he ever had to pay up the rent as it fell due and go against his principal for repayment.

This right was reserved in the notice given by Mrs. Deen as it was in the case of Morgan *v.* Smith, in the consent which was given to the underletting. The same learned judge further says: "Under such a stipulation, the sureties' liability will remain notwithstanding the arrangement between the creditor and the principal debtor, even though it be more lax and favorable to the principal, as in this case * * * Where the remedies of the creditor are reserved against the sureties notwithstanding the new agreement with the principal, the situation of the surety is not varied and the rule does not apply" (p. 545).

VI.—But there is a very plain distinction between this case and any of the cases where the technical rules relating to the demise of real estate have been applied.

This was a demise not only of real estate, but of *valuable personal property as well.*

The house was furnished. It was, therefore, an imperative duty of the lessor to take possession of the property

for the protection and preservation of the personal property.

This was liable not only to be greatly injured but to be wholly destroyed by the manner in which it was being used by a wholly irresponsible occupant, over whom the lessee disclaimed any control.

VII.—There was no question raised on the trial as to the lease to the second tenant not covering all the personal property included in the first lease. It cannot now be raised here. The question only relates to the amount of damages and could have been satisfactorily explained.

Last Point.—The judgment should be affirmed.

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JOSEPH A. SHOUDY,
Of Counsel.

OPINION OF JUDGE SHIPMAN, DELIVERED ON DIRECTING THE VERDICT FOR PLAINTIFF BELOW.

This suit was brought to recover the entire amount of rent claimed to be due from Mr. Wilson, by virtue of his guaranty, and the entire demand includes the $450 accruing on December 1, 1873, and which was sued for in the Marine Court. Upon that suit judgment was rendered for the defendant.

When suit is brought to recover the same demand, the same sum of money to recover which a prior suit had been brought between the same parties and a prior judgment for the defendant had been rendered, the former judgment is a bar until it is set aside. No new evidence can be introduced, no new issues can be raised, no new defenses, no new grounds of recovery can be presented, no errors of the Court which rendered the judgment can be corrected, the judgment stands till it is legally set aside.

When an action is brought to recover another demand of the same nature with that which had been previously the subject of litigation between the same parties, as another note of the same set or class of notes, other coupons of the same set of bonds, or a new installment of rent, the previous judgment may be a bar or a conclusive estoppel to recovery in the second suit; that is, the issues which are proved or conclusively shown by the record to have been passed upon and decided in the first suit, are not to be re-examined and readjudicated in the second suit. If other and new issues are presented in the second suit which were not presented in the first suit, although they might have been presented had the party so chosen, as to those new and different issues the first judgment is not a bar.

Thus in Davis *v.* Brown, 94 U. S., 423, the defendant had been sued upon an endorsed note, and the defense had been set up upon which judgment was rendered for the plaintiff. In a second suit, upon another note of the

same series of notes, endorsed at the same time and for the same consideration and under the same circumstances, another defense was set up which was successful, and the Supreme Court held that the first judgment was not a bar.

So in Cromwell *v.* Sac, 94 U. S., 351, the plaintiff brought suit upon coupons upon county bonds, and was unsuccessful, because the state of the defendant's case was such that it was incumbent upon the plaintiff to prove that he was a purchaser for value. In another suit by the person for whose sole use the preceding action was prosecuted upon earlier maturing coupons of the same bonds, the plaintiff proved that he had purchased for value, and the Court held that the first judgment was not a bar, although he might have shown that fact in the first suit, and although he had alleged in the first complaint that he had given value.

The former judgment is conclusive upon those questions in the second suit which were determined in the first suit. "The judgment in the prior case operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." "Whenever, in one action, a party might have brought forward a particular ground of recovery or defense, and neglected to do so, he is not, in a subsequent suit between the same parties upon a different cause of action, precluded from availing himself of such ground." It is, however, in a suit upon another demand, competent for the plaintiff to present a new ground of recovery, and for the defendant to present a new ground of defense which was not presented in the first suit.

A suit was brought in the Marine Court for the first installment of rent. The plaintiff willingly, or unwillingly, tried the case upon the issue whether his unfulfilled promises in regard to furniture, which was the subject matter of the lease, made the lease void. In this case, that issue, though made an issue upon paper, has not been practically an issue, because this Court, following the decision of the Court of Appeals upon the same facts, has excluded all offered evidence in regard to it. Now it is asked that a prior judgment upon an issue which has been

excluded from this case shall be regarded as conclusive upon the right of the plaintiff to recover here, although this Court refuses to consider that issue as one capable of being raised upon this lease.

But it is said that the lease was declared void for fraud. The record does not show the ground of the verdict, but it is admitted that the only question which was at issue, and the only ground of the verdict, was that the representations in regard to the furniture were intentionally untrue and were relied upon by the lessees, and therefore the signatures were obtained by fraud. Now it is said that we do not know what were the representations which were relied upon. We may fairly infer what the representations were; but suppose we cannot, the point still remains that this question of fraud or no fraud is not an issue here and is not a fact here.

I do not place the decision upon the ground that the judgment of the Marine Court was erroneous. The fact that a prior unrecovered judgment upon the same facts and the same issues which are presented in the second suit, was erroneous is not important. But, the issue which was decided in the Marine Court is not the actual and admitted, but the excluded issue here.

Therefore I do not think that the first judgment is conclusive upon the whole demand. If it did, as matter of law, preclude the recovery of the whole demand, then I am inclined to the opinion that the question of estoppel in regard to which testimony has been taken, might come into the case; that is, if Mrs. Perry and Mr. Wilson, agreed with the plaintiff that the judgment was vacated and cancelled, and thereby wilfully and intentionally induced her to alter her previous position to her damage and hurt, and then refused to treat the judgment as cancelled but fraudulently relied upon it as a defense, they might be estopped to show that it was an existing and uncancelled judgment.

It is, however, conclusive upon that part of the demand, which was the subject of the Marine Court suit.